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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

PETITION FOR A WRIT OF CERTIORARI, AND APPENDIX, TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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October Term 1964

No. _____

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - - *Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of Estate
of Charles D. Dunne, Deceased, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 7, 1965 in action No. 15,959, styled All States Investors, Inc., Plaintiff-Appellee v. The Bankers Bond Company, Inc., and Elinore Sedley, Defendants-Appellants, and James E. Dunne, II, and Moses Master, Administrator of the Estate of Charles D. Dunne, Defendants-Appellees.

THE OFFICIAL AND UNOFFICIAL OPINIONS OF THE DISTRICT AND APPELLATE COURTS.

The petition for writ of certiorari is from a judgment of the United States Court of Appeals for the Sixth Circuit, decided April 7, 1965; petition for rehearing denied May 20, 1965.

There are copied in the Appendix copies of opinions and orders in this action and the companion case of Texas Continental Life Insurance v. Dunne, tried together in 1959, resulting in a hung jury, and in process of trial January 21-23, 1963, when both actions were settled. The settlement in the companion case was consummated.

1. January 8, 1959. Interlocutory order entered January 8, 1959, District Court ruling that bonds of City of West Buechel had been invalidly issued (A. 1).*
2. January 17, 1959. Appeal filed January 17, 1959, from order ruling bonds had been invalidly issued (A. 3).
2. February 6, 1959. Memorandum on appeal filed (A. 4).
4. February 7, 1959. District Court order striking appeal and directing Clerk not to forward Court Record to Court of Appeals for the Sixth Circuit (A. 8).
5. July 15, 1960. Opinion Judge Swinford, District Court Judge, sustaining motion for judgment notwithstanding no verdict by jury in

*"A." refers to the Appendix to this Petition; "a" refers to Appellants' and "b" to Appellees' Appendices in the Court of Appeals.

Texas Continental Life Insurance Company, Plaintiff v. The Bankers Bond Company, Inc., et al., Defendants (187 F. Supp. 14) (A. 9-32).

6. August 7, 1962. Decision United States Court of Appeals (6th C.A.), reversing 187 F. Supp. 14. Texas Continental Life Insurance Company v. Dunne, 307 F. 2d 242 (A. 33-44).
7. January 23, 1963. Trial Order (A. 44).
8. June 6, 1963. Order of Judge Frank W. Wilson, U. S. District Court, Judge, setting out action taken at conference in Chattanooga, Tennessee, on April 27, 1963 (A. 47-49).
9. October 4, 1963. Opinion and order of Honorable Frank W. Wilson, U. S. District Judge, dated October 3, 1963, directing payment for an indemnity agreement of $90,000.00 cash, and $15,000.00 by October 21, 1963, in lieu of the bonds, or have judgment for $257,500.00, with interest, entered against defendants (A. 49-54).
10. October 26, 1963. Order of Court (Judge Frank W. Wilson), overruling motions of petitioners to file defensive pleadings and ordering parties to close settlement on November 12, 1963 by substituting an assignment and indemnity agreement in lieu of bonds which All States Investors, Inc., had agreed to sell The Bankers Bond Company, Inc. (A. 58-61).
11. November 22, 1963. Order granting any party in interest to December 2, 1963 to respond to defendant's, The Bankers Bond Company, Inc., motion to file defensive pleadings, counterclaim and third-party complaint v. A. Berkowitz.
12. December 6, 1963. Opinion by Judge Frank W. Wilson overruling motion to file answer and

third-party complaint by The Bankers Bond Company, Inc., and Elinore Sedley (A. 62).

13. December 13, 1963. Order staying entry of judgment to January 6, 1964 (A. 69).

14. January 2, 1964. Order staying entry of judgment pending final action by U. S. Court of Appeals, Docket No. 15,701 on petition for mandamus, filed by petitioners (A. 70).

15. February 20, 1965. Order United States Court of Appeals (6th C.A.), Docket No. 15,701, overruling petition for writ of prohibition and mandamus (A. 71-72).

16. March 19, 1964. Judgment of Court (A. 73-75).

17. March 24, 1964. Order that judgment entered March 19, 1964 be stayed pending further action by the Court (A. 75-76).

18. April 15, 1964. Opinion of District Court on pending questions (A. 76-79).

19. April 15, 1964. Order modifying judgment entered March 19, 1964, and overruling motions of defendants, The Bankers Bond Company, Inc., and Elinore Sedley, to set aside judgment, and for leave to take depositions of A. Berkowitz, Henry Strasburger, and Honorable Frank W. Wilson (A. 79).

20. April 23, 1964. Order directing plaintiff to respond to motion of defendants to amend judgment and orders entered March 19, 1964, and April 15, 1964 (A. 80-81).

21. May 8, 1964. Order of Court (Judge Wilson) with respect to disposition of action against defendants, J. E. Dunne, II, and Moses Master, Administrator of the Estate of Charles D. Dunne, deceased (A. 81).

22. May 21, 1964. Order amending judgment as modified (A. 81).
23. June 2, 1964. Order by United States Court of Appeals (6th C.A.), overruling appellants' motion to stay proceedings to enforce judgment pending appeal (A. 84).
24. June 2, 1964. Order United States Court of Appeals (6th C.A.), denying application of petitioners for leave to take interlocutory appeal (A. 84).
25. June 2, 1964. Order United States Court of Appeals (6th C.A.), denying motion of respondent, All States Investors, Inc., motion to dismiss appeal (A. 85).
26. April 7, 1965. Decision of United States Court of Appeals entered April 7, 1965, affirming judgment below (A. 87-99).
27. May 20, 1965. Order entered May 20, 1965, United States Court of Appeals (6th C.A.), denying petition for rehearing by defendants-appellants, The Bankers Bond Company, Inc., and Elinore Sedley (A. 100).
28. June 1, 1965. Order United States Court of Appeals staying issuance of the mandate pending due application for certiorari to Supreme Court of the United States (A. 100).

JURISDICTION.

Review is sought of a judgment of the United States Court of Appeals for the Sixth Circuit dated and entered April 7, 1965 (A. 95-107). A timely petition for rehearing was filed April 27, 1965, and denied May 20, 1965 (A. 108). Pursuant to Rule 24 of the

United States Court of Appeals, on motion timely filed, an order was entered on June 1, 1965 by the Court of Appeals staying issuance of the mandate for thirty days, provided that if there is filed within such stay with the Clerk of the Court of Appeals, a certificate of the Clerk of this Court, that this petition, record and brief have been filed, the stay shall continue until final disposition by this Court.

QUESTIONS PRESENTED.

1. Whether, when an action has been settled by a voluntary private contract, and breached by one of the parties, the Court may, on motion of the party in default, acquire jurisdiction to change the contract, order the parties who were not in default to comply with the contract made by the Court, over their objections, by paying the party in original default $105,000.00 or have judgment entered against them for $257,500.00.

2. Whether a settlement of an action is final in the absence of grounds to void a contract.

3. Whether either the District Court, or Court of Appeals may consider the record before settlement to adjudicate the rights and obligations of the parties to a contract, made in settlement of the action.

4. Whether an attorney can bind his client by negotiating for an intended contract, contrary to instructions of his clients.

5. Whether a mutual mistake made in a contract is grounds for the District Court to eliminate the mis-

take, by substituting a new consideration for the promise to pay in the original contract.

6. Whether the Court of Appeals has jurisdiction to treat an interlocutory order of the District Court entered prior to the settlement of the action, and ruled by that Court to be non-appealable, as a final order, on the grounds the order had become final because no appeal had been taken, and then consider the interlocutory order, treated as final, as determining the issues arising out of breach of the settlement.

7. Whether the Court of Appeals should review the proceedings in a pending action in the District Court between the parties to the appeal on petition for rehearing, to determine whether a party to the pending appeal had deceived the District Court by acts of omission, which led the Court to make a decisive ruling, contributing to the judgment entered. It was represented and accepted by the Courts below as true that the bonds had been lost or stolen during trial in 1963. The record in the action pending below contains an admission by officers of respondent that they had not seen the bonds since 1959.

8. Whether the District Court and the Court of Appeals denied due process of law to petitioners, by denying them the right to file a defense, and, to counterelaim, and to take depositions to prove their defenses to the motion, and to a trial of the issues made by the motion and tendered responsive pleadings of the petitioners. *Willner* v. *United States,* 376 U. S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175; *Holt, et al.* v. *Commonwealth of Virginia,* —— U. S. ——, 14 L. Ed. 2d 290, 85 S. Ct. ——; F.R.C.P. 38(a).

9. Whether the Court of Appeals has jurisdiction to rule upon interlocutory orders of the District Court *sua sponte,* from which no appeal was pending. 28 U.S.C. 1291, 1292(4-b).

10. Whether F.R.C.P. 56(e) controls procedure in summary proceedings in the District Court, and whether the judgment is in conflict with its own, and with decisions of other Courts of Appeals. *United States* v. *Ball* (C.C.A. 4), 326 F. 2d 898 @ 902; *Groves* v. *Ohio Turnpike Commission* (C.C.A. 6), 315 F. 2d 235, and cases cited in opinion, in finding that Rule 56 did not control proceedings on a motion for judgment, supported by affidavits.

11. Whether a consent given in a cognovit section of the contract of settlement, applicable if the petitioners defaulted, to the entry of a judgment against them on motion, was void by the law of the State where made.[1]

12. Whether a final judgment can be entered in a multiple claim, multiple party action, without adjudicating the rights of all parties and all claims. F.R.C.P. 54(b).

---

[1] *Kentucky Revised Statute 372.140* provides:

"Power of attorney to confess judgment; release of errors.

"(1) Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.

"(2) No person shall appear for a defendant under any such power in any court in this state."

Kentucky Revised Statute 372.990 provides:

"Any person who violates any of the provisions of subsection (2) of KRS 372.140 shall forfeit one thousand dollars to the defendant, and shall be liable to damages at the suit of the party aggrieved."

STATEMENT OF CASE.

The plaintiffs were residents of Texas; the defendants, residents of the Western District of Kentucky. The amount of the claim involved was in excess of $10,000.00 and arose under the laws of the United States, vesting jurisdiction and venue in the first instance in the United States District Court for the Western District of Kentucky, 28 U.S.C.A. 1331, 1332(a)2, 28 U.S.C.A. 1391, 15 U.S.C. 77v(a), and 15 U.S.C.A. 78aa.

Judge Frank W. Wilson, United States District Judge for the Eastern District of Tennessee, sat by designation.

The second trial started on January 21, 1963. On January 23, 1963, the parties announced:

> ". . . All matters have been settled in each suit and as between each of the parties . . . " (1a).

Entry of a final order was postponed pending the closing within thirty days by the parties of the settlement agreement (1a).

All States Investors, Inc., did not tender delivery of the West Buechel Bonds; the agreement was not consummated (A. 50).

Mr. Berkowitz, counsel for defendants, arranged with Mr. Strasburger, attorney for All States Investors, Inc., for a conference with Judge Frank W. Wilson in Chattanooga on April 27, 1963, to pressure his clients to agree to a modification of the settlement (38a, 39a, 40a).

On April 18, 1963, the respondent filed a motion for judgment.

The petitioners, by Mr. John McCarthy, attorney, moved for dismissal of the action at the April 27, 1963 conference. The transcript, pages 28 and 29, reads:

> "Mr. McCarthy: Yes your Honor. This agreement has a paragraph in it that says that if Bankers Bond doesn't come up with the money and doesn't perform summary judgment shall be issued, and the reason given for that was so this long litigation would be over with. I think it works both ways, with the intention of the parties to end that litigation, to draw up an agreement that the parties were to live by and their rights are to be determined by this rather than by the case that they settled . . .
>
> Mr. Berkowitz: Mr. McCarthy, maybe the client would be better off without me . . .
>
> The Court: Well, the Court, quite frankly, if you have some authority I would be glad to hear you on that. The Court would have great difficulty on any fundamental principles of contract or anything else to understand how this agreement is either enforceable one way or the other, or it would appear to the Court that the original lawsuit remain pending, period. I don't see how the agreement under any circumstances could be interpreted in such a manner as to relieve the agreement of any enforcement and at the same time dismiss the original lawsuit.
>
> Mr. Berkowitz: Here's one thing he is entitled to do, he is entitled to believe it.
>
> The Court: Yes, I'll be glad . . .

> Mr. Berkowitz: And one thing the client is entitled to do, when they have a lawsuit on the same side (laughter). Now, in all seriousness, Mr. Davis, right here in open court I have two obligations, one to you, and that is the primary obligation. I don't ask to be relieved, but I will certainly understand it if I would be. I can't assert on my authority that this action be dismissed. That doesn't mean I'm right, I'm usually wrong. Second (laughter) . . . . may I have a little conference here?"[2]

When the impasse developed between petitioners' attorneys, Mr. McCarthy and Mr. Berkowitz, at the conference on April 27, 1963, the Court directed Henry W. Strasburger, attorney for All States Investors, Inc., to file an amended motion for judgment.

Mr. Strasburger filed the amended motion on May 8, 1963, reading:

> "AMENDED MOTION FOR JUDGMENT TO SAID HONORABLE COURT:
>
> "Comes now All States Investors, Inc., and respectfully moves this Honorable Court to enter judgment in its favor against The Bankers Bond Company, Inc., and Mrs. Elinore Sedley, for $250,000.00 plus interest as prayed for in its Orig-

[2]A preliminary consent decree was entered on April 26, 1963, in the United States District Court for the Northern District of Texas in a stockholders derivative action filed by Mr. Berkowitz against the three original plaintiffs in this action, represented by Mr. Henry Strasburger in both actions. By the consent decree Mr. Berkowitz and his associates received a fee in stock of Professional and Business Men's Insurance Company, formerly known as All States Insurance Company, of the estimated value of $250,000.00 for dismissal of the action (A. 102-114; 8a). Neither the District Court or petitioners were advised at the conference on April 27, 1963 of the decree entered the day before (A. 102-113).

inal and Amended Complaints, and directing Defendants, The Bankers Bond Company, Inc., and Elinore Sedley, to immediately and forthwith deliver to the Hon. Henry Heyburn, of the Louisville, Kentucky, Bar, whose office is in the Kentucky Home Life Building, Louisville, Kentucky, the consideration provided in the Settlement Agreement between the parties dated January 23, 1963, to-wit: a cashier's check for $90,000.00 and a promissory noted dated February 21, 1963, payable in five equal installments of $3,000.00 each, without interest except in the event of default, in which such event notice of the entire balance then due with interest thereon from the date of said default at the rate of 6% per annum, duly signed and executed by The Bankers Bond Company, Inc., and Mrs. Elinore Sedley, personally, and as grounds therefor says . . ."

On October 4, 1963 Judge Wilson ordered The Bankers Bond Company, Inc., and Elinore Sedley to pay $90,000.00 and deliver the note for $15,000.00 for an indemnity agreement, by October 21, 1963, and, that if defendants-petitioners failed to do so, that:

". . . a summary judgment will enter against the defendants in accordance with the stipulation contained in the settlement agreement and in the respective sums there stipulated as to the respective defendants" (Opinion signed by Honorable Frank W. Wilson, Judge, filed October 4, 1963) (A. 62).

The Bankers Bond Company, Inc., and Elinore Sedley discharged Mr. Berkowitz when they learned

from the letters attached to respondent's motion for judgment on file in the Clerk's office that he had arranged the April 27, 1963 conference to pressure them into making a new settlement agreement (52a).

New counsel filed motions to withdraw the opinion (45a-53a), and in support filed an affidavit that petitioners had never agreed to a modification of the settlement agreement (52a, 53a). They moved to file an answer and counterclaim (54a-57a) to the amended motion for judgment (51a-54a).

The answer and counterclaim denied the grounds for plaintiff's motion for judgment, and demanded judgment against All States Investors, Inc., for $50,000.00 damages for breach of the settlement contract. The Court overruled the motion to file the answer and counterclaim (13a), denying petitioners due process of law. *Holt* v. *Commonwealth of Virginia* (decided May 17, 1965), —— U. S. ——, 14 L. Ed. 2d 290, 85 S. Ct. ——.

The Court signed a judgment tendered on December 12, 1963, but withheld entry until March 19, 1964 (18a-20a), pending ruling by the Court of Appeals on a petition filed by petitioners to prohibit the entry of the judgment (16a, 17a). The judgment was modified twice, becoming final on May 21, 1964 (25a).

THE DUNNES.

The Dunnes were parties to the settlement.

They were necessary parties to any proceeding to enforce the settlement by which they agreed to pay petitioners $15,000.00 when the settlement was con-

summated, evidenced by a non-negotiable promissory note, which they delivered. One-half of the contract was consummated when the companion case was settled. In the summary proceedings against petitioners, the Dunnes were overlooked by the Court. Petitioners' rights against the Dunnes were not adjudicated as required by F.R.C.P. 54(b). The contract settled issues between All States and the Dunnes, which were consummated. The question was presented by petitioners upon entry of the judgment on March 19, 1964. All States then moved to dismiss the original action against the Dunnes. The motion was sustained by amendment entered May 21, 1964. The Court did not comply with Rule 54(b).

There has been no adjudication of the rights of petitioners against the Dunnes under the new decree contract. The Dunnes were made parties to the appeal for those reasons.

REASONS FOR GRANTING THE WRIT.

The judgment is repugnant to what is universally accepted contract law; that is, that a party cannot recover damages arising out of his default.

The District Court would not have entered a judgment against the petitioners but for the strange actions of Mr. Berkowitz urging the Court to force a new agreement upon his clients, and acting in concert with counsel for respondent for that purpose. The only plausible answer is that he felt obligated to opposing counsel because they had agreed by court stipulation the day before the April 27th conference (8a) to the

dismissal of his stockholders action against respondent, Biggers, and All States Insurance Company,[3] and the payment of a large fee in stock of All States Insurance Cmpany to him and his associates. He admitted he had two obligations, one to his clients, and the other—he did not name (A. 101). He insisted the bonds were worthless, which was contradiction of his representations to the Court prior to the settlement. The bonds were worth $105,000.00 until February 21, 1963. If they are worthless now, it is because they were made so by the interlocutory order, treated as a final order by the Court of Appeals, the effect of which was that Ben Jack Cage had bought invalid bonds, because he gave a secured promissory note as part of the purchase price (A. 18).

All States placed in its appeal appendix the official reporter's transcript of a preliminary oral ruling of the Court that the bonds in controversy were invalidly issued, filed by the reporter on January 22, 1959.

It omitted from its appendix:

(1) The "Order" of the Court entered January 8, 1959, ruling that the bonds were not issued in conformity with the law of Kentucky, and were therefore invalid (A. 1):

(2) A notice of appeal from the "Order" of the Court (A. 3); and

(3) An order of the Court entered February 7, 1959 striking the notice of appeal and denying the

[3]Name changed to "Professional and Business Men's Insurance Company."

right to prosecute the appeal (A. 8). 28 U.S.C. 1291, 1292(4-b).

Petitioners by reply brief advised the Court that an appeal was filed and stricken by the District Court.

The interlocutory order entered in 1959 became moot by the 1963 settlement. Counsel for respondent could not sustain an argument that the settlement was a unilateral promise to pay. They could not substantiate a claim that petitioners had agreed to a new settlement. They knew that the District Court ruling that an attorney has full power to control the rights of his client was contrary to due process guaranteed by the Seventh Amendment; they knew that the texts cited by the District Court to sustain the ruling, did not. They had to create facts to sustain the District Court judgment.

The purpose was served by inserting into the record on appeal the transcript of the 1959 order, re-open the record of the action that was settled to the extent only of having resolved in its favor one of the principal issues involved in the original action, in which no final orders were ever entered.

Another purpose of respondent was to avoid judicial review of the fact that they had agreed to sell certain bonds, they did not have, to petitioners for $105,000.00, which they now contend were worthless, and known by respondent to be worthless at the time it agreed to sell the bonds. By suggesting to the Court of Appeals the 1959 order, the respondent also suggested that the Court look for "facts" to relieve All

States of its obligation under the contract and affirm a judgment mandatorily entered against petitioners. Any decision against petitioners had to be founded on a final judgment that the bonds had been invalidly issued by the City of West Buechel.

The Court of Appeals entered a footnote, aside, judgment, reading:

> "On a preliminary motion in this case, briefed by counsel, the District Judge held that the bonds were invalid. There is no appeal from that order of January 22, 1959, and we accept it as a final adjudication of the issue."

THE SETTLEMENT HAD THE LEGAL EFFECT OF A FINAL JUDGMENT.

The decision treated the settlement as a proposal subject to revision by the Court. It is in conflict with the Court's own decision in *American Textile Machine Corp.* v. *United States,* 220 F. 2d 584, 586-589 (6 Cir. 1955). There was a compromise agreement after the institution of the action. The government rescinded the agreement and the appellant made no further tender or offer to perform. The Court stated:

> ". . . In keeping with that purpose, appellee's obligation was upon the acceptance of the offer to dismiss the present proceedings 'without prejudice.'
>
> "But it does not follow that, in the absence of default on the part of the debtor, the creditor may at will rescind the accord and proceed to enforce the original obligation. If the accord is supported

by consideration, and is otherwise a valid contract, it cannot be validly repudiated except for cause. Although it does not extinguish the pre-existing obligation, it suspends the enforcement of it until it has been legally abrogated. Archibald McNeil & Sons Co. v. Unted States, supra, D.C. 1 F. 2d 39, 41-43, affirmed, 3 Cir., 10 F. 2d 1016; in re Clarence A. Nachman Co., 2 Cir., 6 F. 2d 427, 430; in re Kellett Aircraft Corp., 3 Cir., 173 F. 2d 689, 692; Ohlendlisk v. Schuler, 6 Cir., 299 F. 182, 189; Restatement, Contracts, Sec. 417(a). Like any other valid contract, it cannot be cancelled or disregarded at the pleasure of one of the parties. Andres v. United States, 115 F. Supp. 901, 126 C. Cls. 571; Albin v. United States, 120 F. Supp. 763, 128 Ct. Cl. 204.

. . . . . .

"We are of the opinion that the District Judge was in error in not giving effect to the compromise settlement agreement, even though it has not been performed. Unless shown that it was not a valid contract or that it has been breached by the appellants, as distinguished from non-performance, it stands as a bar to the prosecution of the present action."

and with the opinions in *United States* v. *William Cramp & Sons Ship & Engine Bldg. Co.,* 206 U. S. 118, 128, 27 S. Ct. 676, 51 L. Ed. 983; *Perkins* v. *Fourniquet,* 14 How. 313, 325, 14 L. Ed. 435; *St. Louis K. & S. E. Railroad Co.* v. *United States,* 267 U. S. 346, 349, 45 S. Ct. 245, 69 L. Ed. 649, on the finality of settlements.

Petitioners contend no action was commenced to have the rights of the parties under the contract of January 23, 1963 declared nor adjudicated, *F.R.C.P.* 3; *Julliard & Co.* v. *Johnson,* 259 F. 2d 837 (2 C.A.); *Muskeat* v. *United States,* 219 U. S. 346, 356; that the Court did not acquire jurisdiction by motion; that all facts inferred by the Court to sustain the judgment were denied by the affidavits of Tyrus Davis *(supra);* that they were denied due process by the refusal of the Court to permit them to file any defense to the motion, or to consider the admitted fact that they had not breached the terms of the settlement contract, which the judgment purports to enforce (Seventh Amendment).

The Court of Appeals (page 9) quoted and cited opinions of this Court, its own, and opinions of other Federal and State Courts of Appeal that a settlement agreement voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court. The Court then decided against petitioners on three grounds, each of which are contrary to fact and law, (1) that the substitution of an indemnity bond to defend any action thereafter brought, constituted substantial performance, (2) that the parties were mutually mistaken at the time of the agreement as to the location of the bonds, and (3) that petitioners consented, in the settlement, to entry of judgment against them if they refused to pay All States $105,000.00 for an indemnity bond agreement nine months after All States' default on delivery of the bonds.

The opinion quotes from (pages 9-10), and is in conflict with, *Cummins Diesel Michigan* v. *The Falcon, etc., and W. C. Wright, etc.*, 305 F. 2d 721 (C.A. 7); *Melnick* v. *Binenstock*, 318 P. 533, 179 A. 77 at 78; and *American Textile Machine Corp.* v. *United States*, 220 F. 2d 584, 587-589, C.A. 6, each of which rules a settlement cannot be repudiated by either party (A. 97).

The opinion is in conflict with *Julliard & Co.* v. *Johnson*, 259 F. 2d 837 (2 C.A.), in which the Court ruled:

> "The effect of a compromise and settlement effected by parties competent to contract is that of a judgment which can only be set aside in a direct proceeding. Ogglesby v. Artrell, 105 U. S. 605, 26 L. Ed. 1186, cf. United States v. International Building Co., 345 U. S. 502, 73 S. Ct. 805, 97 L. Ed. 1182."

This Court stated in *United States* v. *Alonzo Child*, 12 Wall. 232, 20 L. Ed. 360, at page 363:

> "In this view of the case it is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. After the compromise, that question was no longer open for inquiry. It is the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the Court of Claims on that subject in another department of the government, this department which sits to administer the law, must be governed by its recognized principles."

The Court of Appeals adopted all of the factual conclusions of the District Judge, each of which was placed in dispute in what the District Court termed summary judgment proceedings. The Court of Appeals states (page 10) that Rule 56 of the Federal Rules of Civil Procedure was not applicable; that the judgment was entered by stipulation and agreement; that it was in the nature of a judgment by consent. The Court's definition of consent is in Footnote 3, page 11, of the opinion to the effect that a consent decree is an agreement of the parties under sanction of the Court as to what the decision shall be. The agreement in this case was a private agreement; was not sanctioned by the Court at the time it was made; and was not of record in the Clerk's office until after the District Court made its ruling (A. 46, 55, 56, 57), on October 9, 1963 (A. 57).

When the companion action was settled on February 21, 1963, the Clerk learned for the first time that he was supposed to have the bonds in this action in his possession. He thereupon advised Judge Wilson in Chattanooga by letter that the bonds had never been in his possession; and that he had never seen any settlement agreement (A. 46).

When the Court's order was entered on October 8, 1963, the Clerk advised Judge Wilson in Chattanooga, Tennessee, by letter, that the agreement had not been filed (A. 56). Judge Wilson then mailed from some source not disclosed, a signed copy of the agreement to the Clerk (A. 57). There is no provision in the agreement that petitioners consented to the entry of

a judgment against them for $257,500.00 in the event the respondent defaulted in its obligations under the agreement.

The Court of Appeals quotes with approval from the opinion of the District Court (A. 95):

> "It is fundamental that a party is bound by the actions of his attorney in the absence of fraud and collusion. 7 C. J. S., Attorney and Client, Section 80; 5 Am. Jur., Attorney at Law, Section 85, et seq. . . ."

5 American Jurisprudence, Attorney at Law, Section 85, outlines what attorneys generally know: That they have control over procedural matters in the absence of fraud or collusion. The section also sets forth what is commonly known to most attorneys; that their agency does not give them the authority to bind their clients on matters which affect the cause of action itself.

The District Court found that Mr. Berkowitz bound the petitioners by his attempts to negotiate a new contract with the attorney for respondent.

5 American Jurisprudence, Section 92, on Attorney at Law, states:

> "92—Limitations on power—The implied authority of an attorney to make stipulations is ordinarily limited to matters of procedure in the management or prosecution of the action; in the absence of special authority, any step which operates as a surrender of the substantial rights of the client will not be upheld by the courts."

7 Corpus Juris Secundum, Attorney at Client, Section 80, states:

> "The broad implied or apparent powers of an attorney with respect to the conduct or control of litigation are, however, limited to matters which relate only to the procedure or remedy. The employment of itself confers upon the attorney no implied or apparent power or authority over the subject matter of the cause of action or defense, and, unless the attorney has expressly been granted authority with respect thereto, the power to deal with or surrender these matters is regarded as remaining exclusively in the client."

The rights of the parties under the private contract of settlement are controlled by Kentucky law. In the briefs filed by petitioners in both the District Court and the Court of Appeals, they relied upon *DeLong* v. *Owsley's Ex'x.,* 308 Ky. 123, 213 S. W. 2d 806:

> "(1-2) An attorney ordinarily has authority to make agreements and stipulations relative to procedural matters and as to how the trial may be conducted in litigation entrusted to him. 5 Am. Jur., Section 82, p. 315; Conrad's Ex'r v. Conrad, 156 Ky. 231, 160 S. W. 937; World Fire & Marine Ins. Co. v. Tapp, 286 Ky. 630, 151 S. W. 2d 340. It therefore follows that appellant's attorney was without authority to agree to waive the pleading of KRS 132.300 as a complete bar to his action, unless his client expressly consented thereto. It is not contended that appellant gave her attorney any authority to make such an agreement."

Neither the District Court nor the Court of Appeals gave any recognition to the Kentucky decision in their opinions, nor to the limitations upon the powers of an attorney in the sections as stated in American Jurisprudence and Corpus Juris Secundum.

If an attorney has the power, in the Sixth Circuit, to surrender, abrogate, or waive the substantive rights of his clients, as the opinions of the Court of Appeals and the District Court state, then it is a question that calls for correction by this Court.

Mr. Berkowitz had his clients attend a conference at which his stated purpose was to have the Court pressure his clients into making a new agreement. Through another attorney, also present, his clients refused to do so. The effect of the Court of Appeals' opinion as applied to the facts of this case is that the petitioners could not stop one of their attorneys from sacrificing their rights.

The writ should be granted to correct the finding of the Court of Appeals that a "mutual mistake" can be corrected by the Court over the opposition of one of the parties to the agreement and enforce the contract as corrected by the Court against the party in compliance with the contract, and in favor of the party in default under the contract.

The writ should be granted because the decision has unsettled the law as to the final and binding effect of a compromise settlement voluntarily made, and for the further reason that a Court should not lift the curtain that fell when the settlement was made, by

re-examining the facts and orders entered in the action prior to the settlement, and making conclusions from such review in justification of its decision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR FIELDS,
1529 Kentucky Home Life Building,
Louisville, Kentucky 40202,

Counsel for Petitioners.

June 24, 1965.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil No. 3384

J. E. Dunne II, etc., - - - - - - Plaintiff,

v.

Bevie F. Biggers, etc., - - - - - Defendants.

Civil No. 3646

Bevie F. Biggers, et al., - - - - - Plaintiffs,

v.

The Bankers Bond Company, Inc., et al., - Defendants.

ORDER—Entered January 8, 1959.

* * * * * * * *

It is ordered that the motion of the Plaintiff, Bevie F. Biggers, for a non-suit in case no. 3646 be and it is hereby sustained and the Plaintiff, Bevie F. Biggers, is dismissed as a party to action 3646.

The motion of the Defendants in 3646 to be permitted to amend the counterclaim to the complaint is overruled.

The court heard arguments as to the validity of the West Buechel bonds in the amount of two million dollars and made a ruling that the bonds were not issued in conformity with the law and Kentucky Statutes and were therefore invalid.

Order

The Attorneys for the Plaintiff in no. 3646 were directed by the court to recast their complaint and file it as a supplemental complaint in that action.

* * * * * * * *

Motions of the Defendant in 3646 to dismiss or for Summary Judgment against the All States Life Insurance Company as a party plaintiff is sustained and the party is dismissed.

Motion of the Defendants in 3646 for Summary Judgment or in the alternative to dismiss as to All States Investors, Inc., is overruled.

* * * * * * * *

(s) Mac Swinford,
Judge, U. S. District Court.

January 7, 1959.

In the

UNITED STATES DISTRICT COURT

For the Western District of Kentucky

Louisville Division

Civil Action No. 3646

Bevie F. Biggers;
All States Investors, Inc., a Texas Corporation; and
All States Life Insurance Company, a Texas Corporation, - - - - - - - - Plaintiffs,

v.

The Bankers Bond Company, Inc.;
Elinore Sedley;
Charles D. Dunne; and
J. E. Dunne II, - - - - - - - Defendants.

NOTICE OF APPEAL—Filed January 17, 1959.

Notice is hereby given that the Defendants, Charles D. Dunne and J. E. Dunne II, hereby appeal to the United States Court of Appeals for the Sixth Circuit from those particular portions of the order of the Honorable Mac Swinford, United States District Court Judge, made and entered January 7, 1959, which particular portions of said order are as follows:

I. "The motion of the defendants in 3646 to be permitted to amend the counterclaim to the complaint is overruled."

II. "The Court heard arguments as to the validity of West Buechel bonds in the amount of Two Million

Dollars and made a ruling that the bonds were not issued in conformity with the law and Kentucky Statutes and were therefore invalid."

(s) A. Berkowitz, Attorney,
1201 Brown Marx Building,
Birmingham, Alabama.

(s) Henry J. Stites, Attorney,
Starks Building,
Louisville, Kentucky.

(s) A Scott Hamilton, Attorney,
Kentucky Home Life Building,
Louisville, Kentucky.

On Jan. 18, 1959, copies mailed to: Hubert T. Willis, 501 So. 2nd St., Louisville, Ky.; James Carey, 310 W. Liberty St., Louisville, Ky.; H. W. Strasburger, Gulf States Bldg., Dallas, Tex., and Henry R. Heyburn, Ky. Home Life Bldg., Louisville, Ky.

(s) Martin R. Glenn,
Clerk.

MEMORANDUM—Entered February 6, 1959.

On January 7, 1959, after a pre-trial conference at which all phases of this case were under consideration and after extended arguments, the court entered, among other things, the following order:

"The motion of the defendants in 3646 to be permitted to amend the counterclaim to the complaint is overruled.

"The Court heard arguments as to the validity of West Buechel bonds in the amount of Two Million Dol-

lars and made a ruling that the bonds were not issued in conformity with the law and Kentucky Statutes and were therefore invalid."

On January 17, 1959, the defendants, Charles D. Dunne and J. E. Dunne II, filed a Notice of Appeal seeking a review of the above cited order.

The order is not a final order within the meaning of 28 USCA 1291. It is only a part of an order in which the court made rulings to simplify the issues, eliminate from the controversy all questions of law and to clarify the questions of fact on which proof is to be offered and which questions of fact are ultimately to be submitted to the jury for its determination.

It has long been an express policy that piecemeal appeals are improper and delay the ultimate decision in legal proceedings. Baltimore Contractors v. Bodinger, 348 U .S. 176.

The defendants are evidently attempting to prosecute an appeal under 28 USCA 1292 (b). This section of the Code was enacted as an amendment to Sec. 1292 by an Act of Congress of September 2, 1958. It is my judgment that this is not a case for its application. Since it has been on the statute books for only a comparatively short time there is little authority to guide the trial courts. However, since the section does not expressly modify the long recognized construction of Sec. 1291 and the accepted and sensible policy of allowing appeals only from final judgments, subject to well defined and enumerated statutory exceptions, the new provision should be used sparingly and only in exceptional cases where an immediate appeal may avoid protracted or expensive litigation. Milbert v. Bison Laboratories, 260 F. 2d 431; Kroch v. Texas Co., 167 F. Supp. 947; Bobolakis v. Compania Panamena Maritima San Gerassimo, USDC SNY, 2 Cir., November 26, 1958, 27 LW 2269.

Memorandum

My interpretation of the Act is that its provisions are jurisdictional and that no appeal from an interlocutory order, such as the one involved here, can be prosecuted unless the order from which the appeal is sought to be taken expressly states that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The opinion in Milbert v. Bison Laboratories, supra, quotes at length from the report of the Committee on the Judiciary of the House of Representatives on the bill. The report contains the following language.

> "To begin with, before an appeal can be had, the district court must certify in writing that the order involves a controlling question of law and that an immediate appeal may materially advance the ultimate determination of the case."

And the report made on the bill by the Committee on the Judiciary of the Senate it is said:

> "It is discretionary in the first instance with the district judge for he must state in writing as a part of his order that it is his opinion that the order involves a controlling question of law concerning which there is substantial doubt and he must further state that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

It was obviously the will of the Congress in enacting this legislation that the Court of Appeals cannot exercise its discretion in permitting the appeal until such an order from the district court. A careful reading of the Act can lead to no other conclusion.

Memorandum

Examples of the "exceptional cases" referred to in Milbert v. Bison Laboratories, supra, are the long and involved anti-trust cases or cases of a similar nature. The case at bar is not an exceptional case in that sense nor one that can be distinguished from numerous other cases. Neither is it a case that will involve a long trial. Counsel advised the court at the time it was assigned for trial at a pre-trial conference that the trial of the case would not require more than two or three days or a week at the most. To permit the prosecution of an appeal in a case of this nature would, from a practical standpoint, set a precedent for appeals from interlocutory orders in nearly all cases.

It is safe to say that Congress did not intend to so seriously modify the practical effect of Sec. 1291. Judge Maris in Milbert v. Bison Laboratories, supra, stated that the Senate report mentioned anti-trust actions as the type of cases intended as subject to such appeal and that there was nothing in the language of the statute to imply that Congress intended to establish a kind of 'certiorari' policy for the Court of Appeals whereby so-called "important cases" would receive special appellate treatment.

An order striking the notice of appeal from the record and denying the right to prosecute an appeal and directing the clerk to withhold sending the record to the Court of Appeals is this day entered.

(s) Mac Swinford,
Judge.

February 4, 1959.

Copies mailed on Feb. 6, 1959, to:

Hubert Willis, 501 So. 2nd St., Louisville, Ky.;
A. Scott Hamilton, Ky. Home Life Bldg., Louisville, Ky.;
Henry Heyburn, Ky. Home Life Bldg., Louisville, Ky.

(s) Martin R. Glenn,
Clerk.

ORDER—Entered February 7, 1959.

The Notice of Appeal filed on January 17, 1959, in which the defendants, Charles D. Dunne and J. E. Dunne II, seek to appeal to the United States Court of Appeals for the Sixth Circuit is ordered stricken from the record and the appeal is denied. The order is not appealable since it does not state in writing that it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is not a final judgment and an appeal cannot be had at this time. 28 USCA 1292 (b).

It is ordered that the record be not prepared and forwarded to the United States Court of Appeals for the Sixth Circuit. See Memorandum.

(s) Mac Swinford.
Judge.

February 4, 1959.

Copies mailed on Feb. 7, 1959, to:

Hubert Willis, 501 So. 2nd Street, Louisville, Ky.;
A. Scott Hamilton, Ky. Home Life Bldg., Louisville, Ky.;
Henry Heyburn, Ky. Home Life Bldg., Louisville, Ky.

(s) Martin R. Glenn,
Clerk.

UNITED STATES DISTRICT COURT

Western District of Kentucky
Louisville Division

No. 3747

Texas Continental Life Insurance Company, - Plaintiff,

v.

Bankers Bond Company, Inc.,
Elinore Sedley,
Charles D. Dunne and
J. E. Dunne II, - - - - - - - Defendants.

OPINION—Filed July 15, 1960.

Action by purchaser of invalid municipal bonds against brokerage corporation and others who participated in placing bonds on market. Plaintiff moved for judgment in accordance with its motion for directed verdict. The District Court, Swinford, J., held that where defendants had withheld the material fact that the bonds had been sold not for money but for a promissory note which, by its terms, might be redeemed by the bonds themselves, defendants were liable to plaintiff for price paid for bonds.

Motion sustained.

1. Fraud ⁘ Key 64(1)

A common-law action for fraud, deceit, misrepresentation and covin must necessarily be based on a factual situation, and is primarily a case for determination by a jury.

2. Fraud Key 64(1)

In action against brokerage corporation and others to recover price plaintiff had paid for invalid municipal bonds which had been placed on market under the defendant's auspices, evidence on case of action for fraud did not warrant directing verdict for plaintiff. Fed. Rules Civ. Proc. rule 50(b), 28 U.S.C.A.

3. Licenses Key 18½(39)

Both the Federal Securities Exchange Act of 1934 and the Federal Securities Act of 1933 were intended to provide full and fair disclosure of what is behind, in a material way, securities sold in interstate commerce and through the mails. Securities Act of 1933, § 22, 15 U.S.C.A. § 77v; Securities Exchange Act of 1934, schedules A, B, 15 U.S.C.A. § 78aa.

4. Evidence Key 5(2)

It is common knowledge that the public has been duped for many years in the purchase of what was represented to be gilt-edge securities.

5. Licenses Key 39.37

The Federal Securities Exchange Act of 1934 and the Federal Securities Act of 1933 create a special action by a purchaser which differs substantially from the common-law action for fraud in that the seller must assure the burden of proving lack of knowledge. Securities Act of 1933, § 22, 15 U.S.C.A. § 77v; Securities Exchange Act of 1934, schedules A, B, 15 U.S.C.A. § 78aa.

6. Licenses Key 39.37

Under federal securities legislation and Securities Exchange Commission rules thereunder, one who has bought worthless securities is not put to the difficult and onerous

burden of proving to the satisfaction of a court or jury that the seller lacked integrity. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j (b).

7. Licenses Keys 39.30, 39.37

Under federal securities legislation, the purchaser of invalid bonds has a right to recover without the necessity of offering proof of deceit and intentional fraud, and has a new right of action to recover from the seller for constructive fraud which grows out of a failure to make a full and complete disclosure. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

8. Licenses Key 39.32

Under federal securities legislation, not only is a corporation which holds title to securities at the time of sale legally responsible to purchasers in good faith, but also its officers, authorizing the sale of such stocks, even though the act for the corporation is done through mistake and without fraudulent intent. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

9. Licenses Key 39.37

A purchaser of securities, to recover against a seller, need only prove that a statement in a prospectus or oral communication is in fact false or is a misleading omission and that he did not know of such untruth or omission. Securties Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

10. Licenses Key 39.30

A purchaser of securities may recover against the seller by showing that the seller breached his duty by failing to make disclosures and by withholding facts which in good conscience he should have revealed. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

11. Licenses Key 39.34

When a purchaser of securities does not produce proof of fraud and deceit as at common law, his remedy against the seller is an accounting for the money paid out for the securities. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

12. Licenses Key 39.30

The federal securities laws require a high state of honesty and morality of brokers and dealers, and if a broker or dealer employs any device, scheme or artifice to defraud, or makes an untrue or fraudulent statement of a material fact to induce purchase of a security, or fails to state a material fact which is necessary to make other facts stated not misleading, or if he extends credit in violation of the statutes or regulations to induce purchase of securities, he has violated the law, and the customer may recover from him any loss proximately resulting therefrom. Securities Act of 1933, § 17 as amended 15 U.S.C.A. § 77q; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

13. Licenses Key 39.30

Where brokerage corporation and others, who participated in sale of invalid municipal bonds which were ulti-

mately bought by plaintiff, withheld the material fact that the bonds had been sold not for money but for a promissory note which, by its terms, might be redeemed by the bonds themselves, defendants were liable to plaintiff for price paid for bonds. Securities Act of 1933, §§ 17, 22 as amended 15 U.S.C.A. §§ 77q, 77v; Securities Exchange Act of 1934, §§ 7(c), (2), 10(b) as amended 15 U.S.C.A. §§ 78g(c) (2), 78j(b); Securities Exchange Act of 1934, schedules A, B, 15 U.S.C.A. § 78aa; KRS 58.040.

14. Evidence Key 5(2)

It is common knowledge that there is frequently lack of privity of contract between a bonding house handling an issue of bonds and the ultimate investor.

15. Licenses Key 18½(39)

One of the purposes of federal securities legislation was to prevent an imposition upon the public by individuals and corporations whose business was dealing in securities and who had training, knowledge and experience in the practical processes of a bond issue and the property and potential back of it. Securities Act of 1933, § 22, 15 U.S.C.A. § 77v; Securities Exchange Act of 1934, schedules A, B, 15 U.S.C.A. § 78aa.

16. Licenses Key 39.31

Under circumstances presented in action by ultimate purchaser of invalid municipal bonds against bokerage corporations and others who had participafed in placing bonds on market, privity of contract between purchaser and defendants was not necessary to recovery under federal securities legislation. Securities Act of 1933, § 22, 15 U.S.C.A. § 77v; Securities Exchange Act of 1934, schedules A, B, 15 U.S.C.A. § 78aa.

Opinion

17. Federal Civil Procedure Key 2127

On a plaintiff's motion for judgment in accordance with its motion for directed verdict at close of evidence, evidence must be construed in light most favorable to defendants. Fed. Rules Civ. Proc. rule 50(b), 28 U.S.C.A.

Peter, Heyburn & Marshall, Henry R. Heyburn, Gavin H. Cochran, Mark B. Davis, Jr., Louisville, Ky., Ira Lee Allen, Dallas, Tex., for plaintiff.

Stites & Stites, Henry J. Stites, J. Leonard Walker, Arthur Grafton, A. Scott Hamilton, Louisville, Ky., Berkowitz, Lefkovits & Paden, A. Berkowitz, Charles Najjar, Birmingham, Ala., for defendants.

SWINFORD, District Judge.

This is an action in which the plaintiff is seeking to recover $103,000 with interest on a sale to it of municipal bonds of the sixth class city of West Buechel, Jefferson County, Kentucky. The case was tried by a jury. At the conclusion of all the evidence, the plaintiff moved the court for a directed verdict in its favor. The motion was overruled and the case was submitted to the jury for its determination under instructions of the court. The jury was unable to reach a verdict and was discharged. Within ten days the plaintiff moved the court to enter a judgment in accordance with its motion for a directed verdict made at the close of all the evidence. Rule 50(b), Rules of Civil Procedure, 28 U.S.C.A. The record is now before the court on that motion.

From the evidence offered at the trial the following facts were developed. Except in possibly minor details these facts were uncontradicted.

The defendant, The Bankers Bond Company, Inc., is a corporation organized under the law of Delaware but prin-

cipally transacts business in the Commonwealth of Kentucky and maintains a principal office at Louisville, Jefferson County, Kentucky. It is engaged in the brokerage business and in the buying, selling and handling of securities. The securities in which it deals consists of about 50 per cent municipal business, 40 per cent regional and over-the-counter securities, and 10 per cent securities that are listed on the Midwest Stock Exchange. It has been in business since 1922 and is a well and favorably known firm.

The defendant, Mrs. Elinore Sedley, owns all of the stock of the Bankers Bond Company. She is chairman of the board and treasurer. She is the chief financial officer, is active in the business and has been continuously since the corporation was founded in 1922.

The defendants, Charles D. Dunne and J. E. Dunne II, are father and son respectively. They were officers of the corporation styled The Dunne Press, Inc. The Dunne Press published certain circulars, magazines or other papers of interest to insurance companies and persons in the insurance business. Through their business transactions the Dunnes became acquainted with various individuals and corporate entities in the insurance field. Among these were Ben Jack Cage of Jack Cage & Company and I. C. T. Insurance Company, both of Dallas, Texas, Continental Union Insurance Company, All States Life Insurance Company of Dallas, and the plaintiff, Texas Continental Life Insurance Company, of San Antonio, Texas.

Another person who is prominently mentioned throughout the trial of the case is Colonel Henry J. Stites, attorney of Louisville, Kentucky. Colonel Stites, who has been a practicing attorney since 1913, is an attorney of record for the defendants. He has been the attorney for Mrs. Elinore Sedley since 1942 and a director of the defendant, Bankers Bond Company, since that time. Since 1928 he has done work for the company and has been recognized as its gen-

eral counsel since that time. He has been retained as the lawyer for the company since October 1958. Colonel Stites was also the attorney and general advisor of the sixth class city of West Buechel and its sole legal advisor in the transactions leading up to and the issuance, handling and sale of the bonds involved in this action. The city of West Buechel was incorporated in October 1951.

Colonel Stites was also attorney for and director of the Rauen Construction Company, of which the defendant, Mrs. Sedley owned one hundred per cent of the stock and served with Colonel Stites on the board of directors. The Rauen Construction Company owned a small tract of land of about three acres within the city limits of West Buechel. Another corporation, Kentucky Industrial Corporation, owned entirely by Mrs. Sedley and of which both she and Colonel Stites were directors, owned a tract of twenty-one acres outside of but adjacent to the city limits. Fourteen or fifteen houses had been built on these two tracts of land.

On March 15, 1954, the defendant, Bankers Bond Company, wrote a letter to the Trustees of the City of West Buechel, signed by Elinore Sedley, owner, chairman of the board of directors, and treasurer of the company, in which it proposed a two million dollar revenue bond issue for the building of sewers, waterworks, streets and drainage throughout the area in and adjacent to the city boundaries under the provisions of Chapter 58, Kentucky Revised Statutes. The letter stated that the Bankers Bond Company would prepare the issue and provide for the interest rate not to exceed 3⅝% and set forth various series and maturity dates of the bonds.

It also stated that "it will be futile to have a public sale with bidders, but since Section 58.040 permits the bonds to * * * be sold in such manner and upon such terms as the governmental agency deems best, or * * * may provide that payment shall be made in such bonds. * * *".

We have carried on negotiations with various insurance companies and others who may be interested in purchasing your revenue bonds."

The letter also contained the following paragraph: "We and our attorneys, Messrs. Stites and Stites, will do all the work incident to the issuance of said bonds, including the preparation of all resolutions, contracts, minutes and notices and we will pay all expenses including the cost of printing the bonds, advertising and any other expenses incurred in such issuance and sale, with the cost of the approving legal opinion. For our services, expenses and risk we will charge, and you will agree to pay an amount equal to any sum over par received for such bonds up to 3% of the face amount of all bonds sold, to be paid simultaneously with the delivery of the bonds. Of necessity title to the bonds must technically pass through The Bankers Bond Company in which event, upon securing an offer above par, as above outlined, for and in consideration of our services, without any expenditure other than moneys previously expended, we will take title to the bonds being sold and simultaneously pass title to the purchaser."

The Trustees accepted the proposal of the defendant, Bankers Bond Company, acting on the advice of Colonel Stites, and by proper ordinance authorized the issuance of two million dollars worth of revenue bonds. The numerous orders and minutes of the Board of Trustees required to effect the issuance of the bonds were prepared by Colonel Stites.

In a legal opinion he stated that the bonds were issued for the purpose of constructing a waterworks, sewer, drainage, and street system in the City of West Buechel with reserve facilities for water plant distribution and storage with equal monthly assessments provided by ordinance, payable with each water bill to provide the city with funds for the payment of the bonds and interest upon maturity.

It further stated that from the proceeds of the sale of the bonds, there would be maintained a sinking fund for paying interest.

The purposes of the bonds were set forth on the face of the bonds themselves, clearly indicating that the proceeds from the bonds were to be used for the development purposes recited, from which revenues were to create a sinking fund for the retirement of the bonds upon their maturity and for current interest.

The title to the bonds was transferred to the defendant, Bankers Bond Company. A circular setting out the opinion of Colonel Stites was issued by the Bankers Bond Company in its efforts to sell the bonds. The bonds were printed by the Dunne Press, of which the defendant, Charles D. Dunne, was an officer and in a managerial position. Through the defendants, Charles D. Dunne and J. E. Dunne II, the Bankers Bond Company and Jack Cage & Company of Dallas, Texas, opened negotiations for the sale of the entire two million dollar bond issue.

The negotiations between the Bankers Bond Company and Ben Jack Cage culminated in a sale of the bonds to Jack Cage & Company. In consideration for the bonds the purchaser paid the sum of $335,000 in cash and executed a promissory note in the sum of $1,725,000 of September 6, 1954, which is in words and figures as follows:

"Promissory Note

"Dallas, Texas

"$1,725,000.00 September 6, 1954

"For Value Received, Jack Cage & Company, a Texas corporation, does hereby promise to pay to the order of The Bankers Bond Company, Incorporated, at the office of the First National Bank in Birmingham, Alabama, the sum of One Million Seven Hundred Twenty-Five Thousand and no/100th Dollars ($1,275,-

000.00), plus interest thereon at the rate of five percent (5%) per annum, from date to the date of maturity.

"The principal on this note shall be payable in seven (7) equal annual installments; each of which shall be in the amount of Two Hundred Forty-Six Thousand Four Hundred Twenty-Eight and 57/100th Dollars (246,428.57). The first installment of principal shall be due and payable on March 15, 1956, and an installment of principal shall be due and payable on March 15, of each year thereafter until this note is paid in full. The interest on this note shall be payable as it accrues upon the unpaid principal balances hereof, on each date that an installment of principal becomes due and payable.

"This note may be prepaid in part or in full at any time without penalty.

"This note is secured by that certain Assignment of even date herewith from Jack Cage & Company to The Bankers Bond Company, Incorporated.

"The first installments of principal and interest of this note (due March 15, 1956) shall be paid in cash. With the exception of the first installments of principal and interest of this note (due March 15, 1956), all other installments of principal or interest or principal and interest of this note may be paid in cash or by the transfer, without recourse, to the holder hereof of Revenue Bonds issued by the City of West Buechel, Jefferson County, Kentucky. In the event of the payment of any such installment by the transfer of one or more such Revenue Bonds, such Revenue Bonds shall be accepted by the holder of this note as the equivalent of cash in the amount of the then unpaid principal bal-

ance of the bonds transferred, plus accrued and unpaid interest thereon.

"In the event of failure to pay when due any installment of this note, or in the event of the breach of any of the agreements contained in said Assignment, the holder hereof may declare the unpaid principal and accrued and unpaid interest on this note immediately due and payable.

"Each maker, surety, endorser and guarantor of this note does hereby waive presentation of payment, notice of non-payment, protest and notice of protest and does hereby agree to all extensions and renewals of this note, without notice.

"In the event this note is placed in the hands of an attorney for collection after maturity, the undersigned maker agrees to pay an additional amount equal to a reasonable attorney's fees.

"Jack Cage & Company

"Attest:

"(s)

"Secretary-Treasurer

"By (s) Wile E. Ball

"Vice President"

This note was assigned by Bankers Bond Company to the City of West Buechel without recourse on December 8, 1954.

From the cash payment, Bankers Bond Company received a fee of $60,000. Out of this sum it paid a fee of $20,000 to Mr. Arlie Baker of Detroit, Michigan, which was explained in the evidence as being a "finder's fee" or a service of that nature. It should be pointed out that the record discloses no connection which Mr. Baker had with

the transaction except that he was the husband of the former wife of the defendant, Charles D. Dunne, and stepfather of the defendant, J. E. Dunne II. I state this fact, not that it has a material bearing on the outcome of the case, but for the purpose of showing the connection between the recipient of this money and certain defendants against whom judgment is sought. Colonel Henry J. Stites received from this sum the amount of $10,000 and Bankers Bond Company kept $30,000. The City of West Buechel received $275,000.

From the Texas end of the transaction, the defendants, Charles D. Dunne and J. E. Dunne II, had made the contact and carried out the necessary planning to induce the purchase and to negotiate the sale and delivery of the bonds. Through its messenger, T. H. Hayden, comptroller of The Dunne Press, Inc., transported the bonds from Louisville, Kentucky to Dallas, Texas in a commercial airplane. At the time of the delivery Jack Cage & Company promised to pay the Dunnes $100,000 for their assistance in making the transaction. Twenty-five thousand dollars in cash was paid to Charles D. Dunne and J. E. Dunne II with a promise to pay the remaining $75,000 in deferred payments.

Two payments were made by draft on the Republic National Bank of Dallas, Texas and transmitted by mail to the Liberty National Bank and Trust Company, Louisville, Kentucky, as credits on the $1,725,000 note. No further payments as were made and the note became in default.

The bonds were never advertised for sale or made available for purchase to investors through normal channels of publicity in related cases. The receipt of all moneys for the bonds was handled by the Bankers Bond Company in a special account and under a different arrangement from that of any other bond issue that had been handled by the Bankers Bond Company up until that time. It was not

brought under the supervision of the vice president of the Bankers Bond Company, who was in charge of the municipal department, as all other issues had been with possibly one exception. The account was subject only to checks signed by Mrs. Elinore Sedley and Colonel Stites.

The record discloses that the City of West Buechel had a population of 350 to 400 people; that the property owned by Mrs. Sedley's two companies, Rauen Construction Company and Kentucky Industrial Corporation, was only sparsely settled and had living on it a small percentage of the population. Notwithstanding this disparity between what is called in the evidence the "old part" or densely populated part of the town and the "new part" or sparsely populated part of the town which belonged to Mrs. Sedley, approximately 66 per cent or two-thirds of the money received from the sale of the bonds was spent on the "new part" while only one-third was spent on the "old part" of the town.

After the sale of the bonds to Jack Cage & Company, Charles D. Dunne and J. E. Dunne II sought to resell some of the bonds for Jack Cage & Company on a commission basis.

The plaintiff, Texas Continental Life Insurance Company, was organized in 1955. It had borrowed a substantial sum of money from Mr. Bevie F. Biggers of Dallas, Texas. The bonds involved in this lawsuit were purchased for the plaintiff by Mr. Biggers because of his financial interest in the company. The sale of the bonds was made by Ben Jack Cage of Jack Cage & Company, who contacted Mr. Biggers and was introduced to him by the defendant, Charles D. Dunne. The sale was made and the transaction concluded in April of 1955. Mr. Biggers was not at the time either a stockholder, officer or director of the plaintiff company but was acting solely as its agent in the purpose of these bonds.

At the time of the transaction, Mr. Biggers had before him the prospectus which had been issued by the Bankers Bond Company. He had no knowledge of the transaction between Bankers Bond Company and Jack Cage & Company in the sale of the bonds for part cash and the promissory note with its reservations on the question of payments and the right of the payor to credit the note or pay it off with the bonds.

On January 6, 1959, in a companion case of All States Investors, Inc. v. Bankers Bond Company, Inc., et al., No. 3646, the court held that the bonds were invalid. The ruling was based upon a construction of Sec. 58.040, Kentucky Revised Statutes, and on the authority of rulings of the Court of Appeals of Kentucky in Guthrie v. Curlin, Ky., 263 S. W. 2d 240; Webster County v. Hall, 275 Ky. 54, 120 S. W. 2d 756; Eagle v. City of Corbin, 275 Ky. 808, 122 S. W. 2d 798; Pulaski County v. Ben Hur Life Ass'n, 286 Ky. 119, 149 S. W. 2d 738.

This action seeks to restore the parties to their former position by permitting the plaintiff to recover the money which it paid for the invalid bonds. The plaintiff is not asking for additional damages or raising any question as to losses which might have been sustained. It is alleged that the defendants have conspired together and acted in concert for the purpose and with the intent of knowingly violating the law by arranging and taking part in the sale of the bonds on credit and the concealment of the true facts connected with the issuance and handling of the bonds.

The case was practiced along two lines. The plaintiff claimed that it had been defrauded and was entitled to recover on a common-law action of fraud and deceit. It further claimed that the defendant, Bankers Bond Company, was in violation of the provisions of the Federal Securities Exhange Act of 1934, as amended, 49 Stat. 704, U.S.C.A., Title 15, Section 78g (c) (2), which is:

"(c) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer * * * (2) Without collateral or on any collateral other than exempted securities and/or securities registered upon a national securities exchange, except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe * * *."

It is further claimed that the defendants by virtue of their acts and conduct, implemented by use of the United States mails and various letters and documents sent through the United States mails, were in violation of Rule X-10B-5 of the Federal Securities & Exchange Commission which is as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange (1) to employ any device, scheme or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

The complaint further states that the acts and conduct of the defendants, implemented by their use of the United States mails and letters and documents sent through the

mails, were in violation of the Federal Securities Act of 1933, as amended, 48 Stat. 84, U.S.C.A., Title 15, Section 77q, which reads as follows:

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement or a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

"(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

"(c) The exemptions provided in Section 77c of this title shall not apply to the provisions of this

section. May 27, 1933, c. 38, Title I, Sec. 17, 48 Stat. 84."

[1, 2] The common-law action for fraud, deceit, misrepresentation, and covin must necessarily be based on a factual situation from which deductions must be drawn and is primarily a case for determination by a jury. The question was submitted to the jury under instructions of the court and on the basis of the court's opinion that the evidence was of such a nature that it should not be determined as a matter of law that the defendants had entered into a conspiracy to defraud the plaintiff. The court is still of that opinion and as to the common law action for fraud, the motion for a directed verdict should be overruled.

In view of the conclusions as reached on the second or statutory cause of action, it is unnecessary to comment further upon or consider the common-law cause of action and this opinion will be devoted to a discussion of the rights of the plaintiff under the provisions of the Federal Securities Exchange Act of 1934 and the Federal Securities Act of 1933, both as amended.

The court has jurisdiction of the action under the provisions of 15 U.S.C.A. §§ 77v and 78aa.

[3, 4] It is the purpose of the legislation in both the 1933 and 1934 Acts to provide full and fair disclosure of what is behind, in a material way, securities sold in interstate commerce and through the mails. It is common knowledge that the public has been duped for many years in the purchase of what were represented to be gilt-edged securities. It was for the purpose of stopping this fraud, by those who had securities to sell, either as owners or brokers, that the President of the United States in a special message urged that there be added to the ancient rule of caveat emptor the further doctrine of "let the seller also beware.". Courts have pointed out that the legislation was

designed to protect investors and placed upon issuers, underwriters and dealers, requirements to make full and fair disclosure of the character of the securities. Wilko v. Swan, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168.

[5] The responsibility for reprehensible acts of omission or commission is placed upon those who purport to issue statements for the public's reliance. The statutes create a special action to recover which differs substantially from the common-law action in that the seller must assume the burden of proving lack of knowledge. Wilko v. Swan, supra.

[6] The undisputed facts of this case bring it squarely within Rule X-10B-5. Under the statute and rule, one who has bought worthless securities is not put to the difficult and onerous burden of proving to the satisfaction of a court or injury that the seller lacked integrity. Sec. 10 (b) of the Act of 1934 (15 U.S.C.A. § 78j (b)) creates a remedy in addition to the common-law right of action for fraud by describing the proscribed conduct as unlawful. Fischman v. Raytheon Mfg. Co., 2 Cir., 188 F. 2d 783. The word "violation" is not limited to a criminal case but includes civil litigation. Osborne v. Mallory, D. C., 86 F. Supp. 869.

[7] I am of the opinion that it was the intention of the Congress by this legislation to give the purchaser of invalid bonds a right to recover without the necessity of offering proof of deceit and intentional fraud. The statute contemplates a new right of action for the good-faith purchaser to recover from the seller for constructive fraud which grows out of the failure to make a full and complete disclosure.

[8] Not only is the corporation which holds title to the securities at the time of sale, but also its officers, authorizing the sale of such stocks, are legally responsible to purchasers in good faith, even though the act for the corpora-

tion is done through mistake and without fraudulent intent. 47 Am. Jur. Sec. 44, p. 596. See also Errion v. Connell, 9 Cir., 236 F. 2d 447.

[9] A plaintiff purchaser need only prove that a statement in a prospectus or oral communication is in fact false or is a misleading omission and that he did not know of such untruth or omission. Ouachita Industries, Inc. v. Willingham, D. C., 179 F. Supp. 493; Thiele v. Shields, D. C., 131 F. Supp. 416.

[10, 11] By showing that the defendants breached their duty by failing to make disclosures and by withholding facts which in good conscience they should have revealed, the plaintiff established its case. Without proof of the elements of fraud and deceit as at common law, the remedy is an accounting to the plaintiff for the money it paid out for the defendants' worthless paper. Kardon v. National Gypsum Co., D. C., 73 F. Supp. 798; Dupler v. Simmons, D. C., 163 F. Supp. 535.

By restoring the parties to their former status, if the theory of each litigant is accepted, no one is hurt. The defendants contend that the bonds are valid and worth what the plaintiff gave for them. If that be ultimately determined to be the case, the defendants would lose nothing by a cancellation of the transaction and a restoration to the plaintiff of its money. If it should be determined that the bonds are worthless, to permit the defendants to retain the money for bonds which they launched into the channels of trade without compliance with the established law in the issuance and sale of such securities would be to ignore the salutary purposes of the Securities Exchange Act of 1934 and the defrauded purchaser would be relegated to whatever remote remedy he might have before the statute was passed.

[12] The rule is succinctly stated in the opinion of the court in Smith v. Bear, 2 Cir., 237 F. 2d 79, 87, 60 A.L.R. 2d 1119.

> "The federal securities laws require a high state of honesty and morality of brokers and dealers in transactions with customers. If a broker or dealer employs any device, scheme or artifice to defraud or makes an untrue or fraudulent statement of a material fact to a customer to induce him to purchase a security, or if he fails to state a material fact, which, in the light of all the circumstances, is necessary to make other facts stated not misleading, or if he extends credit to a customer in violation of the Act or the regulations promulgated pursuant thereto, all to induce a customer to purchase securities, then the broker has violated the law and the customer may recover from him any loss proximately resulting therefrom."

To quote from the opinion of the Supreme Court in Securities and Exchange Commission v. W. J. Howey, Co., 328 U. S. 293, 66 S. Ct. 1100, 1104, 90 L. Ed. 1244, "the statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."

[13] In applying the rules of law which I have set out in this opinion to the undisputed facts, there can be but one logical conclusion and that is that the defendants and each of them are liable to the plaintiff for the amounts set forth in the prayer of the complaint. The defendant, Mrs. Elinore Sedley, and her attorney, Colonel Stites, acting on behalf of the defendant, the Bankers Bond Company, with the active aid, assistance and participation of the defendants, Charles D. Dunne and J. E. Dunne II, created and brought into existence two million dollars worth of securities, which, by a series of interstate transactions and com-

munications, they launched into the channels of trade by selling them to a purchaser, who in turn sold them to the plaintiff. It is not necessary that the court find on this motion that there was actual premeditated fraudulent and deceptive planning on the part of the defendants. Whether there was or not, the results are the same.

It was represented to the plaintiff that these were municipal bonds on which the interest was to be paid and which were to be retired on the revenue derived from a municipal development for which the purchaser's money was to be used. It was not revealed to the purchaser that the defendants had entered into a private contract whereby a note for a part of the purchase price was executed containing a provision that the note might be paid with the bonds. Such a plan cannot be called anything but an imposition upon or deception of a purchaser without notice of such unusual circumstances. The fact that this plaintiff's money was used to pay commissions, attorney's fees and coordinate development of property owned by the defendant, Elinore Sedley, who was in turn the owner of the defendant, Bankers Bond Company, is but a circumstance. It might be considered in determining the question of conspiracy to defraud under the common law but for the determination of the rights of the plaintiff under Rule X-10B-5, it is not greatly material. This court takes the straight road and that is that a material fact was withheld from the plaintiff at the time it, in good faith, invested its money. The material fact was that the bonds had been sold, not for cash where the money could immediately go to work, but for a promissory note which turned out to be worthless and the further fact that the note itself could be redeemed or credited at any time by the bonds themselves.

[14, 15] The defendants argue strenuously that the plaintiff should be denied recovery because there was no privity between the plaintiff and the defendants at the

time of the sale. The court is of the opinion that such a fact is not material under the statute. Rule X-10B-5 admits of no such loophole but on the contrary speaks of the duties and obligations of the seller. It is common knowledge that there is frequently lack of privity of contract between a bonding house handling an issue of bonds and the ultimate investor. One of the purposes of the legislation was to prevent an imposition upon the public by individuals and corporations whose business was dealing in securities and who had training, knowledge and experience in the practical processes of a bond issue and the property and potential back of it.

[16] The defendants cite in support of their contention, among other cases, the case of Joseph v. Farnsworth Radio & Television Corp., D. C., 99 F. Supp. 701. This was a case in which the complaint was dismissed for failure to state a cause of action. The court did say a semblance of privity between vendor and purchaser of securities seems to be requisite. At best, that is not a very strong statement and indicates some doubt in the mind of the court. It should also be noted that the case was testing the allegations of the complaint, unlike the case at bar where the evidence for both sides was all in. At any rate, I cannot agree that under the state of case before me, privity of contract was a necessary fact to sustain the plaintiff's case on the incident motion.

[17] Without citation of authorities, the court accepts the rule advanced by the defendants to the effect that on a motion of this character, the evidence must be construed in the light most favorable to the defendants and I have so construed the evidence. The difficulty with the defendants' case is that they must admit the execution of the note to some of them and the provisions of the executed note. In addition to this, they must admit the prospectus and opinion of Colonel Henry J. Stites handed down on

March 15, 1954 and on November 15, 1954, in which it was stated as follows:

> "These bonds are issued for the purpose of constructing a water works, sewer, drainage and street system. * * *.
>
> "From the proceeds of the sale of these bonds a sum equal to the interest which will accrue for a period of one year on the issued bonds will be maintained in the sinking fund for paying current interest and safeguarding payment of future interest."

The defendants well knew that no such sinking fund could be created from a development which could not be had with a promissory note which could be redeemed by a use of the bonds themselves.

In the light of all the evidence, I must conclude, as heretofore indicated, that the plaintiff's motion for a directed verdict should be sustained. An order to that effect is this day entered.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Nos. 14596-97

Texas Continental Life Insurance Company,
Plaintiff-Appellee,
v.
Charles D. Dunne and
J. E. Dunne, II,
Defendants-Appellants.

Texas Continental Life Insurance Company,
Plaintiff-Appellee,
v.
The Bankers Bond Company, Inc., and Elinore Sedley,
Defendant-Appellee.

Appeal from the United States District Court, Western District of Kentucky, Louisville Division.

OPINION—Decided and Filed August 7, 1962.

Before: Cecil and Weick, Circuit Judges and Boyd, District Judge.

Weick, Circuit Judge. This appeal is from an order granting plaintiff's motion, filed pursuant to Rule 50b of the Federal Rules of Civil Procedure, for judgment in accordance with its motion for a directed verdict made at the close of all the evidence and after the jury had disagreed and a mistrial had been declared. The order was in

conformity with the opinion of the District Judge reported in 187 F. Supp. 15.

Plaintiff's complaint contained two counts, one at common law for fraud and the second for conspiracy to violate the Federal Securities Act of 1933, as amended, the Federal Securities Exchange Act of 1934, as amended, and Rule X-10B-5 of the Federal Securities and Exchange Commission, in the sale of municipal bonds issued by the City of West Buechel, Kentucky, a city of 350 to 400 people.[1]

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[1] SECURITIES ACT OF 1933

Sec. 17(a); 15 U.S.C. § 77q

Par. 77(q) Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

SECURITIES EXCHANGE ACT OF 1934

Sec. 10(b); 15 U. S. C. § 78j

Regulation of the Use of Manipulative and Deceptive Devices.

Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any other facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SECURITIES AND EXCHANGE COMMISSION RULE X-10B-5

17 C. F. R. Par. 240.10b-5

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

(Footnote continued on following page)

Since the judgment of the District Court was based solely on the second count, we will consider only that count.

The lawsuit grows out of the purchase by plaintiff on April 29, 1955 of $100,000 face value "Waterworks, Sewer, Drainage and Street Revenue Bonds of the City of West Buechel" for which plaintiff paid $103,000 and which it seeks to recover claiming that the bonds were invalid and worthless. The bonds were part of an issue of $2,000,000 dated March 15, 1954.

The bonds were issued for the purpose of providing funds to construct a waterworks, sewer, drainage and street system for the City with reserve facilities for water plant distribution and storage from which revenue would be derived to create a sinking fund for the payment of interest and retirement of the bonds. A sinking fund was to be maintained from the proceeds of sale to pay interest.

The City contracted with Bankers Bond Company to do all the work incident to the issuance of the bonds, including the preparation of resolutions, contracts, minutes and notices and Bankers was to pay all expenses in connection therewith for which it would receive a commission equal to any sum over par received for such bonds up to 3% of the face amount of all bonds sold. The contract recited that it would "be futile to have a public sale of the bonds" and that Kentucky statutes permitted the City to sell the bonds in such manner and upon such terms as it deemed best. The contract provided that of necessity title to the

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It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

bonds must technically pass to Bankers which in turn would pass title to the purchaser upon receipt of an offer above par. A circular setting out the opinion of its attorney was issued by Bankers. The bonds were printed by Dunne Press of which Charles D. Dunne was an officer.

The bonds were sold by Bankers through Charles D. Dunne as its agent to Jack Cage and Company of Dallas, Texas and were sent from Louisville, Kentucky to Dallas, Texas in a commercial airplane. Cage paid $335,000 in cash and executed an instalment note for $1,725,000 payable in seven equal annual instalments commencing March 15, 1956 with interest at 5% per annum. The note provided that, with the exception of the first instalment, all other instalments of principal or interest may be paid in cash or by the transfer without recourse to the holder of the note of Revenue Bonds issued by the City of West Buechel. The note was secured by an assignment of even date of an interest in a commission agreement and payment was guaranteed by an insurance company affiliated with Cage. Bankers assigned the note to the City. The ordinance passed by the Board of Trustees of West Buechel authorizing the sale of the bonds on credit contained no mention of the right reserved by Cage to transfer bonds as payments on the note.

Bankers received a fee of $60,000 from the cash payment. Out of this sum it paid $20,000 to Arlie Baker of Detroit as a "finders fee." Mr. Baker's connection with the transaction was that he was the husband of the former wife of Charles D. Dunne and the step-father of J. E. Dunne, II. The law firm of Col. Henry J. Stites, Bankers' attorney, received $10,000 for legal services and Bankers kept $30,000. The City of West Buechel received the balance of $275,000. Cage promised to pay the Dunnes $100,000 for their assistance in the transaction of which

$25,000 was paid in cash to them and the balance was promised to be paid in deferred instalments. About two-thirds of the money received by the City was spent on improvements which benefited lands owned by corporations controlled by Mrs. Elinore Sedley who also controlled Bankers.

After the sale of the bonds to Cage, Charles D. Dunne and J. E. Dunne, II sought to resell some of the bonds for Cage on a commission basis. Charles D. Dunne introduced Ben Jack Cage of Jack Cage & Co. to Bevie F. Biggers who purchased the bonds acting as agent for plaintiff.

Only two payments were made as credits on the note which were made by draft drawn on a Dallas bank and transmitted by mail to a bank in Louisville, Kentucky and the note became in default.

The bonds were not advertised for sale or offered to investors through the normal channels. Since the City received only a small part of the proceeds of sale it did not have funds to construct the improvements for the payment of which the bonds had been issued. Without the improvements the City was unable to collect revenue to create a sinking fund for the payment of interest and principal for the retirement of the bonds.

There were a number of irregularities in the issuance and original sale of the bonds, but the principal ones relied on were the sale on credit to Cage and the provision in the note giving Cage the right to pay it by the transfer of the bonds. In reality this was a sale of only $335,000 of the bonds since the purchaser could rescind as to the balance by tendering back the bonds to the holder of the note.

Plaintiff claims that the defendants conspired to violate the law by bringing into existence this issue of bonds and launching it into the channels of trade by a series of interstate transactions and use of the mails whereby some of the bonds were sold to plaintiff who was an innocent pur-

chaser. Specifically, it was claimed that defendants omitted to state material facts which were necessary in order to make the prospectus which had been issued not misleading. The material facts which plaintiff claims defendants omitted to state were the sale of the issue on credit and the provision in the note authorizing transfer of bonds in payment.

Defendants did not deny the sale on credit to Cage or the provisions in the note giving him the right to transfer bonds as payments of the note. They did deny that they had omitted to state material facts and claimed that Mr. Biggers was fully advised of all of these facts before he made the purchase.

Whether Biggers had knowledge of these facts was a vital issue in the case which was bitterly contested before a jury. Biggers testified that he relied on the provisions of the bonds, the prospectus and statements made to him by the Dunnes and did not know of the prior sale of the issue on credit to Cage and if he had known he would not have purchased the bonds for the plaintiff.

Charles D. Dunne testified as follows concerning knowledge of Mr. Biggers of the sale to Cage on credit:

> Q. Now, you did talk to Mr. Biggers about these bonds from Cage did you not?
>
> A. I have testified so many times on this point. Mr. Biggers wanted to meet Mr. Cage. He knew all about the bonds—
>
> Q. You just didn't talk to him about it?
>
> A. I set up a meeting with Mr. Cage and I was there when he brought the bonds. I was very much surprised Mr. Cage would buy that big wad of Texas Continental stock, and I didn't talk to him about it, but he did know they were bought on credit because I tried to borrow on the contract and I explained it to him.

James E. Dunne, II testified:

> Q. Please tell the jury as best you recollect what you told Mr. Biggers about the West Buechel bonds.
>
> A. Well, as has been stated, it was an unusual transaction, therefore worthy of note, and I had told Mr. Biggers of the fact that Jack Cage and Company had purchased the Two Million bond issue in its entirety. I told him also of the circumstances under which Jack Cage and Company made it over, told him of the fact that they had paid $275,000 in cash, that they had executed a note for a million, seven hundred twenty-five, that they had paid I believe it was 3 points or $60,000 above the par value, and that this million, seven hundred twenty-five thousand dollars would be paid in 7, I believe it was 7, instalments, of approximately a quarter of a million dollars each, and that with the cash the City of West Buechel would receive, that certain improvements would be constructed, that this was a relatively undeveloped area, which was a fact well known.
>
> Q. Now, you understand that you are under oath, do you not? Sir?
>
> A. Yes, sir.
>
> Q. Do you swear to this jury that you told these facts to Mr. Biggers before the Texas Continental Life Insurance Company purchased those bonds from Jack Cage and Company?
>
> A. Most assuredly. . . .

James Dunne, Sr. testified as to a conversation with Mr. Biggers several months after the sale as follows:

> Q. Did he (Biggers) have any discussion with you on the occasion of that trip about West Buechel bonds?

A. Yes. He knew quite a bit about them.

Q. What did he tell you about West Buechel bonds on that trip?

A. He told me that he had acquired a number of those for Texas Continental Insurance Company, San Antonio, and that he considered them a good bond and that Ben Jack Cage, that he got them from—said he went and solicited Ben Jack Cage for them. He thought he made a pretty good deal and that Ben Jack Cage had told him that. He said—he asked me if I knew about Ben Jack Cage buying them on time and I said no. And he said, well, he put about 20 to 25% up on them, and he didn't see why we couldn't do that in my deal over in Arizona.

In considering the issue of knowledge, we must view the evidence as well as the inferences properly deducible therefrom in the most favorable light to the defendants. The trial court may not weigh the evidence or find the facts. The court may grant the motion under 50b only when a question of law is presented. Hamilton Foundry & Machine Co. v. International Union, 193 F. 2d 209 (CA 6), certiorari denied 343 U. S. 966.

The testimony of James E. Dunne, II tended to prove that Mr. Biggers had knowledge of the sale on credit to Cage. The testimony of Charles D. Dunne that Biggers "knew all about the bonds" and "did know they were bought on credit because . . . I explained it to him" is of little value because it contains Mr. Dunne's conclusions which are not evidence. He should have related the conversation and not his conclusions. Nor do we accept as evidence of knowledge of the sale on credit the testimony of James Dunne, Sr. relating admissions made by Mr. Biggers to him some months after the sale. In our judgment, Mr. Biggers' statements to Mr. Dunne, Sr. were not part of

the res gestae and Biggers had no authority after the sale to bind plaintiff with his admissions. Westmoreland v. Memphis Transit Company, ____ F. 2d ____ (CA 6). Even if the evidence was admissible for impeachment purposes, it still would not be competent to prove the fact of knowledge. Bridges v. Wixon, 326 U. S. 135, 153; Birdsong v. Commonwealth, 289 Ky. 521; Commonwealth v. Strunk, 293 S. W. 2d 629.

It is strenuously argued by plaintiff that these conversations did not reveal to Mr. Biggers that the note contained a provision authorizing the transfer of bonds for payment on the note. But this testimony, if believed, did disclose the sale of $2,000,000 of revenue bonds on credit payable over a period of seven years with a down payment of only $335,000. This evidence tended to prove knowledge on the part of Mr. Biggers of the invalidity of the bond issue because the City obviously could not construct the improvements without the proceeds of the bond issue and could not obtain revenue to pay the interest and principal of the bonds without the completed improvements from which the revenue could be obtained. As we view it, even if the provisions of the note relative to payment by transfer of the bonds had been disclosed to Biggers he would merely have been in possession of additional evidence as to the irregularities of the bond issue.

Cage had paid $335,000 in cash for the bonds. It was the default made by Cage in meeting the balance of the payments of principal and interest on the note which deprived the City of funds to meet its commitments under the bond issue. There was no evidence that Cage tendered bonds to the City as payment on the note.

It was not for us to weigh the evidence in this case or to determine whether the testimony of the Dunnes is worthy of belief. This is solely the function of the jury.

Opinion

The District Court handed down a memorandum opinion in the companion case of All States Investors Co. on the same day its opinion in the present case was rendered. The opinion in the All States Investors Co. case is set forth in footnote 2.

This companion case was consolidated and tried with the cases at bar. The ruling in All States Investors Co. would seem to apply to the case at bar if the conversations between Charles D. Dunne and James E. Dunne, II, above set forth, took place before the bonds were purchased by Biggers. The evidence is undisputed that such conversations occurred prior to the sale although the District Court may have been of the view that they took place subsequently.

In our judgment, the question whether Biggers had knowledge of the sale on credit was a disputed issue of fact which required submission of that issue to the jury.

We are of the view that there was uncontradicted substantial evidence tending to prove conspiracy to violate the federal laws. Each of the defendants participated in it.

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[2]The court has this day handed down a written opinion in the companion case of Texas Continental Life Insurance Company v. The Bankers Bond Company, Inc., et al., No. 3747, and which has been consolidated for trial with this case by an order of court.

The evidence introduced at the trial was in all material respects, with one exception, pertinent to the issues in each case. The one exception was the fact that in the testimony offered by the defendants there was evidence that Bevie F. Biggers, representing the plaintiff, was informed of the fact that the bonds in question had not been sold for cash but had been sold for part cash and for a promissory note of $1,725.000. That evidence is denied by the plaintiff but it must stand as an issue of fact to be determined by a jury.

It is argued by the plaintiff that the fact that the note could be redeemed or credited by the return of the bonds themselves was not known and is not claimed to have been known by Bevie F. Biggers and this being a material fact and concealed is sufficient of itself to establish the liability of the defendants even though it may be admitted for the purposes of the motion that Mr. Biggers was advised of the note transaction at the time of the purchase of the bonds.

The court is of the opinion, however, that if Mr. Biggers knew of the note, he was thereby advised of the irregularity of the bond issue and could not claim to be a bona fide purchaser without notice.

The plaintiff's motion for judgment in accordance with the motion for a directed verdict made at the close of all the evidence should be overruled. An order to that effect is this day entered.

The conspiracy did not terminate when the bonds were sold to Cage. The fraud permeated and affected the entire issue of bonds which defendants placed in the channels of trade and any purchaser has a right to rely on the prospectus and the provisions of the bonds. It was not necessary that there be privity between plaintiff and the defendants in the sale of the bonds. Cf. Hooper v. Mountain States Securities Corp., 282 F. 2d 195 (CA 5). If this were not so the issuers and brokers could easily evade liability under the law because it is well known that the original purchasers of the securities do not always retain them as permanent investments and that the public trades in securities.

Defendants further claim that they acted in good faith and are innocent of any wrongdoing and that there was no evidence of any intent to defraud on their part. The intentions of the defendants are properly inferable from their acts and may be shown proven by circumstantial as well as direct evidence.

We think the evidence proves an intentional violation of the federal law by them and we are unable to attribute innocence to acts of the character which the undisputed evidence in this case shows:

Defendants further contend that the transaction between plaintiff and Cage constituted an exchange, trade or swap of plaintiff's securities for the bonds in question and that the measure of damages is the value of the securities traded. The only trouble with this contention is that plaintiff gave its check to Cage for $103,000 and Cage gave plaintiff its check for the purchase of stock and the Chapman College mortgages from plaintiff. The District Court was correct in determining as a matter of law that the checks made the transactions sales for cash.

Defendants asserted a defense of unclean hands arising out of the facts concerning the issue of plaintiff's stock. This was no defense to the claim stated in the complaint and the trial judge did not abuse his discretion in refusing to hear extraneous matters as it would have further complicated the issues in an already complicated case.

Defendants further contend that the trial judge erred in determining that the issue of bonds was illegal. This was done in another case and may not be reviewed here. Suffice it to say that the court properly charged the jury that they were not trying the validity of the bonds and should not go into that subject.

It follows from what we have said that the only issue remaining in the case is one of fact, namely, whether Biggers had knowledge that the sale of the bonds to Cage was on credit. If he did not have such knowledge, then plaintiff may recover, otherwise not. Upon remand of the case only this disputed issue of fact shall be submitted to the jury under proper instructions. Rule 59(a), Federal Rules of Civil Procedure; 6 Moore's Federal Practice, Second Edition Par. 59.06, 59.15 [3] p. 3906.

For error in granting the motion for judgment, the order of the District Court is reversed and the causes are remanded for further proceedings.

TRIAL ORDER OF THE COURT (JUDGE FRANK W. WILSON) DATED JANUARY 23, 1963.

1963

1-23 "Trial Order" of the Court (Judge Frank W. Wilson) dated January 23, 1963.

The Court reconvened at 1:30 P.M. on this date, and the parties having announced that all matters have been settled in each suit and as between each of the parties hereto, the Court thereupon dismissed the

jury. The entry of a final order on these causes will await the closing by the parties in accordance with the agreement of settlement, the said closing to be made on or before thirty days from this date, whereupon a final order will be entered in accordance with settlement agreement.

UNITED STATES DISTRICT COURT
Office of The Clerk
Western District Kentucky

February 21, 1963

Honorable Frank W. Wilson
United States District Judge
United States Courthouse
Chattanooga, Tennessee

All States Investors, Inc., vs. The Bankers Bond Company, Inc., et al.
Civil No. 3646

Texas Continental Life Insurance Company vs. The Bankers Bond Company, Inc., et al.
Civil No. 3747

Dear Judge Wilson:

For your file I am enclosing herewith a photocopy of the Agreed Order and of the Order of Dismissal both signed by you in Civil Action No. 3747 (Texas Continental Life Insurance Company vs. The Bankers Bond Company, Inc., et al.) which were today delivered by Mr. Henry R. Heyburn and entered in this office.

There has not been received in this office any order in Civil Action No. 3646 (All States Investors. Inc., vs. The Bankers Bond Company, Inc., et al.) since the Pre-Trial Order and the Trial Order, both of which were entered on January 23, 1963.

Letter Dated February 21, 1963

I have not seen any settlement agreement that may have been entered into between the parties in Civil Actions Nos. 3646 and 3747, but when Mr. Heyburn told me a week or so ago that the settlement agreement in Civil Action No. 3646 provided for delivery by the Clerk of the Court of the West Buechel bonds involved in that action I told him that none of those bonds were ever filed with the Clerk of the Court, and requested that he promptly so advise counsel for the parties in that action. When Mr. Heyburn stated on yesterday that the bonds involved in Civil Action No. 3646 had not been located, I took the liberty of calling you to acquaint you with my conversations with Mr. Heyburn and to confirm to you that none of the bonds involved in either Civil Action No. 3646 or Civil Action No. 3747 were filed with the Clerk of this Court.

With kind regards and best wishes, I am

Yours sincerely,

Martin R. Glenn,
Clerk, U. S. District Court.

CC: Mr. Henry R. Heyburn,
Kentucky Home Life Bldg.

Mr. H. W. Strasburger,
Gulf States Building,
Dallas, Texas.

Mr. A. Berkowitz,
Bank for Savings Building,
Birmingham, Alabama.

Mr. John Satterfield,
Yazoo City, Mississippi.

Col. Henry J. Stites,
Starks Building,
Louisville, Kentucky.

In the

UNITED STATES DISTRICT COURT

For the Western District of Kentucky,
Louisville Division

All States Investors, Inc.

vs.

The Bankers Bond Company, Inc., et al. } Civil No. 3646

ORDER—Entered June 6, 1963.

This matter came before the Court upon April 27, 1963 at a conference held in Chattanooga, Tennessee before Frank W. Wilson, United States District Judge, sitting by designation, the conference being held upon notice of the Court and Henry W. Strasburger having appeared as counsel for the plaintiff, All States Investors, Inc., and A. Berkowitz and John J. McCarthy having appeared as counsel for The Bankers Bond Company, Inc. and Elinore Sedley, and Henry J. Stites having appeared as counsel for James E. Dunne, II and Mose Master, Executor of the Estate of Charles D. Dunne, the following action was taken:

A report and discussion upon the current status of this case was had in which it was represented unto the Court by counsel for the plaintiff that the municipal bonds, the subject of this action, have been lost, misplaced or stolen. A motion has heretofore been filed by the plaintiff wherein the plaintiff set forth the matters pertaining to the Settlement Agreement entered into in this case upon January 23, 1963, and stating that the said bonds, after diligent search, cannot be located and are therefore either lost, stolen or misplaced and requesting a court order for a sum-

mary judgment against the defendants in the amount of the original suit. Thereupon the defendants represented unto the Court that they had at all times been ready, willing and able to perform in accordance with the Settlement Agreement and to make settlement in accordance therewith upon tender and delivery by the plaintiff of the subject municipal bonds, but that upon failure of the plaintiff to produce, tender and deliver the said bonds, the defendants were no longer obligated under the terms of the Settlement Agreement but rather were entitled to a dismissal of this cause.

The Court having indicated that the motion of the plaintiff did not appear to be broad enough to place all issues before the Court with regard to the enforcement or non-enforcement of the Settlement Agreement, but rather sought only a summary judgment for the full amount of the original suit, the plaintiff thereupon moved to be allowed to amend its motion and to tender a motion seeking enforcement of the Settlement Agreement. Upon tender of such a motion the parties agreed that the Court might consider the motion on the basis of the record as now established, including the exhibits to the original motion and the affidavit with respect to the inability of the plaintiff to locate the bonds. It was further agreed and stipulated by the parties that the defendants were at all times ready, willing and able to make settlement in accordance with the Settlement Agreement, that notice was given as required by the Settlement Agreement setting February 21, 1963 at the office of Henry R. Heyburn, who was authorized to act for both Texas Continental Life Insurance Company and All States Investors, Inc., and that at that time and place the defendants did so tender such payment, conditioned only on delivery of the bonds.

The plaintiff is to submit its amended motion and brief in support thereof on or before May 6, 1963. The defend-

ants will be allowed thirty (30) days thereafter within which to respond to the said motion and in which to file any reply brief thereto.

The original of this Order will be lodged with the clerk and copies will be forwarded to respective counsel with the understanding that any objections or corrections thereto may be made within a period of ten (10) days, whereupon the original Order will be entered accordingly.

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge.

Copies mailed 6/6/63 to:

H. W. Strasburger,
A. Berkowitz,
John J. McCarthy,
Henry J. Stites,
John Satterfield,
Judge Frank W. Wilson,

(s) Martin R. Glenn,
Clerk.

OPINION—Filed October 4, 1963.

This litigation has a lengthy history. It is now before the Court upon a motion of the plaintiff for summary judgment in accordance with a settlement agreement. A major part of the history of this case is set forth in the pre-trial order entered at the time of the second trial of the case, to which reference is made. Suffice it to say there that in the suit as originally filed the plaintiff sought to recover of the defendant the sum of $257,500, with interest, growing out of the purchase of municipal revenue bonds of the City of West Buechel, Kentucky. At the first trial of the case, the jury was unable to agree, and a mistrial was declared.

A second trial of the case was begun upon January 21, 1963. During the course of this trial, a settlement was reached and a written settlement agreement entitled "Agreement of Settlement Between the Parties and Stipulations With Reference Thereto" was entered into by all parties and filed in the case. Thereupon the trial was discontinued, with an order of dismissal to subsequently enter upon closing of the settlement in accordance with the agreement. The substance of the settlement agreement provided that upon the scheduled date for closing the plaintiff would deliver unto the defendant West Buechel municipal bonds having a face value of $250,000 and the defendant would simultaneously pay unto the plaintiff the sum of $105,000, of which $90,000 would be in cash and $15,000 would be represented by a note payable in five annual installments of $3,000 each. Upon the date of closing, the plaintiff was unable to locate the bonds for delivery so that no closing was effected in the case, although a delivery of bonds and closing was effected in a companion case which had been consolidated for trial. The settlement agreement recited that the clerk of the court had possession of the bonds as an exhibit from the previous trial but this turned out to be incorrect and it has developed that the bonds held by the plaintiff could not be located and are lost, stolen, or misplaced. Further negotiations transpired between the parties wherein an assignment, release, and indemnity agreement executed by the plaintiff and individually guaranteed by B. F. Biggers, one of the principal figures behind the plaintiff insurance company, was tendered unto the defendants in lieu of the lost, stolen, or misplaced bonds. An impasse was reached in the attempt to consummate settlement and a motion for judgment was filed by the plaintiff. Thereupon a further hearing was held upon April 27, 1963 and further stipulations were entered into by the parties as set forth in the

order of the Court entered upon that date. At that time it was the opinion of the Court that the plaintiff's motion was too narrow and an amended motion should be filed to insure that all issues presented by the failure of the settlement to be consummated might be before the Court. Upon May 6, 1963 an amended motion for judgment was filed and the briefs of all parties are now before the Court.

The amended motion for judgment filed herein by the plaintiff moves the Court to enter judgment against the defendants for the face value of the municipal bonds ($250,000) which was stipulated as the plaintiff's recourse in the settlement agreement should the defendants fail to honor their commitments therein. In the alternative the plaintiff moves the Court for an order compelling the defendants to comply with the settlement agreement.

In support of its motion the plaintiff relies upon the general law relating to lost instruments to the effect that loss of the instrument does not affect the validity of the transaction and that the Court may condition recovery upon the plaintiff giving the defendant indemnity. The plaintiff further alleges a waiver of delivery of the municipal bonds by the defendant having demanded and received an assignment and indemnity agreements from the plaintiff and B. F. Biggers, this having occurred subsequent to the impasse at the original closing when it developed that the bonds could not be delivered. It is also asserted that the bonds are worthless and that the statute of limitations has run upon them which would render delivery meaningless.

The defendant opposes the plaintiff's motion and seeks to have the plaintiff's cause of action dismissed. Generally, it is the defendant's position that the plaintiff's cause of action is merged into the settlement agreement and that this agreement should be carried out or the plaintiff's ac-

tion dismissed. The defendant seeks to distinguish the law relating to lost instruments, as relied upon by the plaintiff, upon the ground that in the instant case it is not the basis of the transaction that is lost, but the consideration for the settlement agreement. It is further urged that no basis for setting aside the settlement agreement exists as the misplacement of the bonds was not a mutual mistake of material fact but rather a unilateral mistake on the part of the plaintiff. The defendants contend that the original suit should be dismissed and the plaintiffs left without remedy unless it can produce and deliver the bonds in accordance with the settlement agreement.

In accordance with an order entered upon the original trial of this cause, Judge Swinford found the municipal bonds here involved to be void and of no value. By stipulation of the parties, as contained in the pre-trial order entered at the time of the second trial, the bonds have been wholly without value since default was made prior to the filing of this lawsuit in 1958. The statute of limitations would appear to prevent anyone in possession of the bonds from asserting any rights against the defendants or any claims on the bonds. By agreement of the parties at the hearing upon April 27, 1963, as reflected in the order entered with respect to the said hearing, it was stipulated that the Court might "consider the motion on the basis of the record as now established, including exhibits to the original motion and the affidavit with respect to the inability of the plaintiff to locate the bonds." On the basis of the record it appears undisputed that the subject bonds are, by accident and without fault or intention, lost, stolen, or misplaced, and the Court so finds. It is likewise undisputed that the plaintiff has tendered an assignment, release, and indemnity agreement, warranting ownership of the bonds, making an assignment of them to the defendants, releasing

the defendants from any claims by reason of the bonds and agreeing to indemnify the defendants from any claims by reason of their loss. This indemnity agreement is in turn guaranteed by B. F. Biggers individually. The Court finds such indemnity to be fully adequate to protect and secure the defendants.

In addition, and in accordance with the settlement agreement, the plaintiff has heretofore dismissed with prejudice its lawsuit against Dunne, et al., in the District Court of Dallas County, Texas. The defendants have received and retained the full benefit of this dismissal with prejudice. Likewise, it appears that the defendant, James Dunne, II, has, in accordance with the settlement agreement, delivered his note for $15,000 payable unto The Bankers Bond Company, Inc. and Elinore Sedley, and the latter defendants have received and retained this note. The Court finds that all of this, when considered together, constitutes substantial performance of the settlement agreement upon the part of the plaintiff and that the failure to deliver the bonds under the circumstances does not constitute a material failure of performance on the part of the plaintiff. Moreover, the Court finds that the negotiations of the parties, subsequent to discovery of the loss of the bonds, resulted in a modification of the settlement agreement whereby the assignment, release, and indemnity agreement, and the guaranty agreement, would be substituted in lieu of delivery of the bonds. At the time of execution of the settlement agreement the parties were of the common understanding that the bonds were in the possession of the clerk of the court, as expressly stated in the settlement agreement. It now appears that they were mutually mistaken in this and that rather the bonds were lost, stolen, or misplaced at the time of the settlement agreement. With knowledge of the loss and with knowledge of the worthless

nature of the bonds and the minimum nature of any risk, if not total absence of any risk, due to their non-delivery, the parties negotiated with reference to the substitution of an assignment, release, and indemnity agreement, and with reference to a guaranty agreement, resulting in the eventual tender of such assignment, release, and indemnity agreement and guaranty agreement. The Court is of the opinion that the negotiations were such that upon tender of the indemnity and guaranty agreements by the plaintiff, an agreement to modify the original settlement was accordingly effected. On the basis of the record before the Court on the plaintiff's motion, the Court so finds.

The parties will accordingly proceed to effect a closing in accordance with the settlement agreement with delivery of the executed assignment, release, and indemnity agreement of the plaintiff and the executed guaranty agreement of B. F. Biggers being made in lieu of delivery of the bonds. The closing in all other respects shall be effected in the manner provided in the settlement agreement with the date of October 21, 1963 being set as the closing date, unless the parties shall otherwise mutually agree upon another closing date, or unless good cause shall be made to appear unto the Court why another closing date should be set. Upon proper tender by the plaintiff in accordance with this opinion, should the defendants default in performance, then upon certification to the Court of the defendants' default a summary judgment will enter against thse defendants in accordance with the stipulation contained in the settlement agreement and in the respective sums there stipulated as to the respective defendants.

An order will enter accordingly.

(s) Frank W. Wilson,
United States District Judge.

Letter Dated October 8, 1963

UNITED STATES DISTRICT COURT
Office of the Clerk
Western District of Kentucky
Louisville, Ky.

Air Mail October 8, 1963

Honorable Frank W. Wilson
United States District Judge
United States Courthouse
Chattanooga, Tennessee

All States Investors, Inc., vs.
Bankers Bond Company, Inc., et al.
Civil Action No. 3646

Dear Judge Wilson:

Please be advised that your Opinion in the above matter, which you forwarded to this office for filing by letter dated October 3, 1963, was received and filed on October 4, 1963.

As your letter states that you forwarded copies of the Opinion to counsel of record, our office is not forwarding copies to them.

It has just come to my attention that the following language appears at lines 12-17 of the first paragraph of your Opinion:

> "A second trial of the case was begun upon January 21, 21, 1963. During the course of the trial, a settlement was reached and a written settment agreement entitled 'Agreement of Settlement Between the Parties and Stipulations with Reference Thereto' was entered into by all parties and filed in the case."

The last paragraph of your Trial Order dated January 23, 1963, in Civil Actions 3646 and 3747 states in part that:

Letter Dated October 8, 1963

"The entry of a final order on these causes will await the closing by the parties in accordance with the agreement of settlement, the said closing to be made on or before thirty days from this date, whereupon a final order will be entered in accordance with said settlement agreement." The settlement agreement referred to therein was not received in the Clerk's office with the Trial Order, and has not subsequently been received in the Clerk's office.

As stated in my telephone conversation with you on February 20, 1963, confirmed by my letters dated February 21 and May 1, 1963, I have never seen any settlement agreement that may have been entered into by the parties in Civil Actions Nos. 3646 and 3747, and there has not been filed with the Clerk of this Court any such agreement or the West Buechel bonds involved in those actions.

Therefore, it is respectfully pointed out that there is not on file in this office an "Agreement of Settlement Between the Parties and Stipulations With Reference Thereto" mentioned in the first paragraph of your Opinion as having been filed in the case.

With kind regards, I am

Yours sincerely,

(s) Martin R. Glenn,
Clerk, U. S. District Court.

cc:—Mr. Henry W. Strasburger
Fidelity Union Tower
Dallas, Texas

—Mr. A Berkowitz
Bank for Savings Building
Birmingham, Alabama

—Mr. John C. Satterfield
Yazoo City, Mississippi

Letter Dated October 8, 1963

—Col. Henry J. Stites
Washington Building
Louisville, Kentucky

—Mr. John J. McCarthy
Kentucky Home Life Building
Louisville, Kentucky

—Mr. Henry R. Heyburn
Kentucky Home Life Building
Louisville, Kentucky

Judge's Chambers
UNITED STATES DISTRICT COURT
October 9, 1963

Frank W. Wilson
District Judge
Chattanooga, Tenn.
37402

Mr. Martin R. Glenn, Clerk
United States District Court
Federal Building
Louisville 2, Kentucky

Re: All States Investors, Inc.
vs. The Bankers Bond Co., Inc.
Civil Action No. 3646

Dear Mr. Glenn:

I wish to acknowledge your letter of October 8. I am enclosing an executed copy of the "Agreement of Settlement Between the Parties and Stipulation with Reference Thereto." Apparently through some oversight the parties did not file the original agreement, and the enclosed is a

carbon, but it is nevertheless an executed copy and may be filed as an original.

I appreciate your calling this to my attention.

Yours very truly,

(s) Frank M. Wilson,
United States District Judge.

Enc.

UNITED STATES DISTRICT COURT
Western District of Kentucky
Louisville Division

All States Investors, Inc.

v.

The Bankers Bond Company, Inc., et al. } Civil Action No. 3646

ORDER—Entered October 26, 1963.

An opinion was filed in this cause by the Court under date of October 3, 1963 directing that an order enter requiring that the parties proceed to effect a closing upon October 21, 1963 in accordance with the "Agreement of Settlement Between the Parties and Stipulations With Reference Thereto" filed in this cause, with the plaintiff tendering at the closing an assignment, release, and indemnity agreement as guaranteed by the individual, B. F. Biggers, in lieu of the lost, stolen, or misplaced bonds. Upon October 21, 1963 a motion was filed on behalf of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, requesting that the Court withdraw its opinion and

overrule the former motion of the plaintiff for a judgment on the settlement agreement. Upon October 23, 1963 a further motion was filed by the said defendants to be allowed to strike A. Berkowitz and John C. Satterfield as counsel of record and substitute Wilbur Fields as counsel of record. Upon October 22, 1963 a motion was filed on behalf of the plaintiff certifying default by the defendants in closing upon October 21, 1963 and moving for a judgment in the amount of the original complaint in accordance with the stipulations of the settlement agreement and the opinion of the Court. Having considered the motion of the defendants for the Court to withdraw its former opinion and overrule the plaintiff's former motion on the settlement agreement, the Court is of the opinion that the same should be overruled. The principal new matters raised in support of the motion related to the substitution of new counsel. The alleged improper representation of the defendants by former counsel is considered by the Court to be wholly without merit. The defendants were at all times represented by able, honorable, and astute counsel. That the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, were exposed to a potential liability for the full amount of the plaintiff's claim in the sum of $257,500 was shown by the fact that upon the first trial of the case the jury was unable to agree. With an awareness of the experience of the first trial, all of the parties, including the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, personally participated in the settlement negotiations at the time of the second trial and personally approved the settlement as evidenced by their signatures to the agreement. At the time of the hearing upon the plaintiff's motion for judgment upon the settlement agreement, as heard by the Court upon April 27, 1963, the said defendants were likewise personally present and heard all of the

proceedings. At that time the said defendants added new counsel to assist its former counsel in opposing the motion. Now a still further change in counsel has been made. The defendants are entitled as a matter of right to their motion to substitute new counsel. By the device of substitution of counsel, however, the defendants will not be permitted to withdraw their consent to an agreement voluntarily and knowingly entered into by them. Neither are they entitled to a rehearing upon an adverse ruling merely by reason of substitution of counsel. The Court has considered the legal contentions advanced in the defendants' motion to reconsider and can see no cause for modification of its former opinion. In the Court's former opinion provision was made that the parties might by proper motion and a showing of good cause request a date other than October 21, 1963 for closing. For reasons not apparent to the Court, no order was ever submitted in accordance with its opinion of October 3, 1963. The defendants' motion to reconsider will therefore be treated as a request for additional time and a new closing date of November 12, 1963 will be set, subject to the right of the parties to mutually agree upon another closing date or subject to the right of the parties to show good cause why another closing date should be set. The opinion filed herein under date of October 3, 1963 will be modified to this extent only. The motion filed by the plaintiff under date of October 22, 1963 for judgment will accordingly be treated as prematurely filed.

It is, therefore, Ordered and Adjudged:

(1) That the motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, to have the Court set aside or reconsider its former opinion entered upon October 3, 1963 be and hereby is overruled;

(2) That the motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, to relieve A. Berko-

witz and John C. Satterfield as attorneys of record and to substitute Wilbur Fields as attorney of record be and hereby is allowed;

(3) That all parties to this lawsuit shall proceed to effect a closing upon November 12, 1963, in accordance with the "Agreement of Settlement Between the Parties and Stipulations With Reference Thereto" as filed in this cause, with the plaintiff, All States Investors, Inc., being required to tender at the time of the said closing an executed assignment, release, and indemnity agreement and an executed guaranty agreement of B. F. Biggers in lieu of delivery of the municipal bonds the subject of this litigation. The parties shall have the right to mutually agree upon a closing date other than the closing date herein ordered or to petition the Court for setting a date other than herein ordered upon showing good cause therefor. Upon proper tender by the plaintiff in accordance with this order upon the date of closing, should the defendants default in performances, then upon certification to the Court of the defendants' default a summary judgment will enter against the defendants in accordance with the stipulation contained in the settlement agreement and in the respective sums there stipulated as to the respective defendants; and

(4) The plaintiff's motion for judgment filed October 22, 1963 is hereby overruled.

Enter:

(s) Frank W. Wilson,
United States District Judge.

ORDER—Entered November 22, 1963.

This cause is before the Court upon the following motions:

(1) Motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for leave to file an answer and third party complaint, said motion filed November 8, 1963.

(2) Motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for leave to file a transcript, said motion filed November 12, 1963.

(3) Motion of the plaintiff, All States Investors, Inc., for judgment, said motion filed November 13, 1963.

(4) Petition of A. Berkowitz to strike, said petition filed with the Court upon November 12, 1963, and forwarded by the Court to the Clerk for filing under date of November 15, 1963.

It is Ordered that any party in interest desiring to do so shall have until December 2, 1963 to further respond to any of the foregoing motions and petitions, unless within such time good cause shall be shown why additional time should be allowed. Thereupon the Court shall act upon the said motions and petition. A copy of this order shall be sent by certified mail by the Clerk unto all parties in interest. Upon December 3, 1963, the Clerk shall certify unto this Court whether further response has or has not been filed in accordance with this order.

Approved for Entry:

(s) Frank W. Wilson,
United States District Judge.

OPINION—Filed December 6, 1963.

This suit was originally filed upon July 15, 1958. The plaintiff sought to recover of the defendant the sum of $257,500 with interest. It was alleged that the plaintiff had purchased municipal revenue bonds of the City of West Buechel, Kentucky, having a face value of this amount, but that the bonds had turned out to be void and of no value and the defendants were charged with liability for the plaintiff's loss. One trial of the case in 1959 resulted in a mistrial when the jury was unable to agree. During the course of the second trial of the case, in January 1963, the parties entered into a written settlement agreement which became a part of the record in the case and the trial was thereupon discontinued. The case remains pending by reason of the fact that settlement has never been accomplished in accordance with the settlement agreement. The issue of enforcement or non enforcement of the settlement agreement was duly presented unto the Court by motion and after a full hearing thereon the Court entered its opinion upon October 3, 1963 directing the parties to proceed to settle in accordance with the settlement agreement and setting the date of October 21, 1963 for closing. Provision was made in the opinion for the allowance of additional time to any party upon a showing of good cause. Without either closing or requesting additional time, the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, obtained new counsel and filed a motion seeking to have the Court reconsider its opinion sustaining the enforcement of the settlement agreement. The Court thereupon treated the motion to reconsider as a request for additional time and reconsidered its former opinion. Upon October 26, 1963 the Court entered an opinion and order allowing the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, to substitute new counsel, overruling the motion to

reconsider, ordering enforcement of the settlement agreement and setting November 12, 1963 for closing. Provision was again made in the order for the allowance of additional time to any party upon a showing of good cause. Once again, without closing or requesting additional time, the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, have filed further motions that, along with other matters, are now before the Court. More specifically, there are presently before the Court the following motions:

(1) Motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for leave to file an answer and third-party complaint, said motion filed November 8, 1963.

(2) Motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for leave to file a transcript, said motion filed November 12, 1963.

(3) Petition of A. Berkowitz to strike, said petition filed with the Court upon November 12, 1963.

(4) Motion of the plaintiff, All States Investors, Inc., for judgment, said motion filed November 13, 1963.

(5) Motion of A. Berkowitz to strike third-party complaint, said motion filed with the Court upon November 30, 1963.

(6) Response of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, including exhibits one through 29 filed December 2, 1963, and exhibits 30 through 49 tendered December 3, 1963 (the latter exhibits will be considered as a part of and filed with the response).

Taking up first the motions on behalf of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, the Court is of the opinion that the motions should be disallowed. In essence the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, seek to disregard all that has heretofore occurred in this lawsuit, all of the

orders heretofore entered, the agreement which they are parties to in person as well as by counsel, and after five years of litigation, by the device of changing counsel and repudiating the authority of former counsel, seek to file a new answer and recommence their defense of this litigation. In addition, by "third-party complaint," they seek to institute a new lawsuit against their former counsel. This procedure is unknown to the Court and no authority for it is cited. The Court carefully considered its opinion with regard to the enforcement of the settlement agreement in view of the loss of the subject municipal bonds. Decision of the Court that the loss of the bonds did not render the agreement unenforcible was based not only upon negotiations of the parties with reference to the substitution of indemnity, but also on the law with reference to lost instruments and the facts of this case as the Court found them to be. The Court carefully reconsidered its opinion in this regard in light of the defendants' motion to reconsider and the defendants denial of authority of its former counsel before overruling the motion to reconsider.

Now, by motion to be allowed to file a new answer and a third-party complaint, the defendants would disregard the clear rulings and orders heretofore lawfully and properly entered and start anew. The only apparent justification asserted by the defendants for this procedure is that they now have new counsel and wish to proceed upon his advice and to repudiate the authority of their former counsel to represent them. The record would seem to reflect that the defendants have of their own volition added or dropped no less than five attorneys in the past year of this litigation alone. The Court is unable to find any merit in the defendants' contentions with reference to former counsel having acted without authority or without knowledge of the defendants. The record reflects that the defendants were most ably represented during the time of which they

now complain. The authority of the defendants' former attorneys is questioned by the defendants only with reference to negotiations in regard to acceptance of indemnity in place of the lost, stolen, or misplaced bonds. It is fundamental that a party is bound by the actions of his attorney, in the absence of fraud or collusion. 7 C. J. S., "Attorney and Client," Sec. 80; 5 Am. Jur., "Attorney at Law," Sec. 85, et seq. Not only is there a total absence of fraud or collusion, but on the contrary the record reflects that the defendants personally participated in many of the matters of which they now complain. The record reflects that the defendants personally approved the settlement agreement as evidenced by their signatures on the agreement. The record reflects that they were personally present at the hearing before the Court on the motion to enforce the settlement agreement when there was a full discussion of the matters now complained of. Furthermore, the Court's opinion with regard to the enforcement of the settlement agreement by substitution of the indemnity agreement for the lost, stolen, or misplaced bonds was based upon the law with reference to lost instruments, and the fact that the plaintiff had already partially performed under the agreement by dismissal with prejudice another lawsuit, as well as the negotiations between the parties. The legal conclusion reached by the Court with regard to the enforcement of the agreement would have been required in the absence of any negotiations between the parties with regard to indemnity.

Litigation must proceed to a termination in accordance with orderly and well established rules. A Court cannot repeatedly rule upon matters only to have its orders disregarded. After consideration and reconsideration by the Court the plaintiff may still question the correctness of an adverse ruling by the Court by proper steps for appellate review, but the defendant may not disregard the clear rul-

ings of the Court and seek to commence lawsuits anew upon matters that have and could have been litigated. Otherwise, lawsuits would never terminate and rulings would only be a signal for the adversely affected party to employ new counsel and commence anew the litigation.

While the Court feels that no offense was intended when the statements are read in full context, statements in the affidavit of the President of The Bankers Bond Company, Inc. filed in support of the said defendant's motion display a lack of understanding of judicial procedures and point up the importance of legal counsel directing legal proceedings. It adds little to the proper trial and disposition of the lawsuit for a defendant to file an affidavit that a properly held judicial hearing upon a motion "was to threaten and coerce" the defendant in order to terminate the lawsuit, or to state that "we cannot accept their (i. e. attorneys') judgment in this matter" after the issue has been decided by the Court, or to state that "I need no instruction as to the potential liability that exists with The Bankers Bond Company as long as the bonds remain unaccounted for" after a Court ruling upon the issue, or to suggest that the Court place an issue in the lawsuit "before the Securities and Exchange Commission, the National Association of Securities Dealers, or the Investment Bankers Association."

The motion of the defendants to be allowed to file as a part of the record a transcript of the proceedings held upon April 27, 1963 will be allowed. The motion of the defendants to be allowed to file an answer and third-party complaint will be denied. The denial of the defendants' motion to file an answer and third-party complaint in turn has the effect of sustaining the motion of A. Berkowitz to strike the third-party complaint.

Turning next to the motion of the plaintiff for judgment, no response has been made to this motion by the

defendants other than matters filed in support of the defendants' motion to be allowed to file an answer and third-party complaint. The settlement agreement as signed and entered by the parties provides in part as follows:

> "If the Bankers Bond Company and Mrs. Elinore Sedley, or either of them, shall fail, within the time herein provided for consummation and closing of this agreement, to carry out and perform their obligations thereunder as hereinabove provided, this Court shall have the right, authority and jurisdiction, upon certification of such fact by counsel of record for each of the plaintiffs, without notice or the necessity for the the hearing of any further evidence, forthwith to enter a judgment in each case in the amount claimed in the complaint against the defendants, The Bankers Bond Company and Mrs. Elinore Sedley, and a joint judgment in both cases against the defendant, James E. Dunne, II, in the amount of $15,000.00, and said defendants hereby waive any right which they might have to appeal or seek to appeal from the judgment so entered."

The plaintiff has now duly certified that The Bankers Bond Company and Elinore Sedley have failed to carry out their obligations under the settlement agreement. This is not controverted, but rather is confirmed by the record. Having now set two closing dates, each of which has been disregarded by the defendants without request for an extention of time or any showing of good cause, the Court has no alternative but to grant the plaintiff's motion for summary judgment in accordance with the above quoted agreement of the parties.

Under date of November 15, 1963 the plaintiff tendered a form of judgment in accordance with its motion for sum-

mary judgment. The defendant has not responded in any way to the amounts set forth in the judgment as being the "amount claimed in the complaint" and the Court assumes that the amounts are therefore correct in accordance with this opinion and in accordance with the settlement agreement. Prior to the entry of a judgment in this amount, the plaintiff should deposit with the clerk the executed assignment, release, and indemnity agreement and the executed guaranty agreement of B. F. Biggers, which are referred to in the Court's opinion of October 3, 1963 and order of October 26, 1963, the deposit of these documents to be certified unto the Court by copy of the receipt of the clerk therefor. Thereupon the judgment should provide that the clerk is directed to deliver the said documents to the defendants or their counsel of record, or such of the same as shall pay the judgment, upon payment of the judgment rendered in accordance with this opinion.

A judgment and order will be prepared by the plaintiff in accordance with this opinion and lodged with the clerk with copy unto counsel for all parties of record. Other parties will be allowed ten (10) days within which to object to the form of the plaintiff's order. The Court will thereupon settle upon which order will be entered.

(s) Frank W. Wilson,
United States District Judge.

ORDER—Entered December 13, 1963.

On motion made on behalf of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for a stay in the entry of a judgment in this cause pending the filing by the said defendants of a petition for mandamus,

It is Ordered that the entry of a judgment in this case in accordance with the opinion of the Court filed upon

December 6, 1963 be and hereby is stayed until January 6, 1964. Any further stay will be granted only upon motion and showing of good cause therefor within the period of the stay herein granted.

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge.

ORDER—Entered January 2, 1964.

On motion made on behalf of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, for further stay in the entry of a judgment in this cause pending the action of the United States Court of Appeals for the Sixth Circuit upon a petition for mandamus, said petition having been filed upon December 30, 1963,

It is Ordered that the entry of a judgment in this case in accordance with the opinion of the Court filed upon December 6, 1963 be and hereby is further stayed pending final action by the United States Court of Appeals for the Sixth Circuit upon the petition for mandamus in Docket No. 15,701, being entitled "Bankers Bond Company and Elinore Sedley vs. Honorable Frank W. Wilson, Judge."

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge
(Sitting by Designation).

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 15701

The Bankers Bond Company, et al., - - Petitioner,

v.

Honorable Frank W. Wilson, etc., - - Respondent.

ORDER—Filed February 20, 1964.

Before: Cecil, O'Sullivan and Phillips, Circuit Judges.

This cause is before this Court on petition for a writ of prohibition and mandamus against a United States District Judge sitting by designation in the Western District of Kentucky. The petitioner seeks to prohibit the District Judge from entering a judgment in conformity with an opinion of said District Judge of December 6, 1963, in case No. 3646, All States Investors, Inc. v. The Bankers Bond Company, et al., pending in the United States District Court for the Western District of Kentucky.

From our review of the aforesaid petition and supporting papers, it appears that during the course of this litigation the parties thereto entered into a settlement agreement which called for payment of fixed sums of money by the defendants to the plaintiffs and for the delivery by the plaintiffs to the defendants of fixed amounts of the bonds which were the subject of the litigation. Prior, however, to the entry of judgment it developed that the bonds that were to be delivered were not available and, accordingly delivery could not be accomplished. Thereafter the defendants made various motions addressed to the District Court,

in part to be relieved entirely from the terms of the settlement agreement and in part resisting the entry of a judgment providing a substitution of certain instruments of indemnity and guaranty for the delivery of the bonds.

From the papers before us we cannot determine whether the judgment, entry of which we are asked to prohibit by writ, would be in strict conformity with the settlement agreement which provided that the judgment to be entered pursuant thereto would be final and unappealable.

Decision as to whether the judgment proposed will be in strict conformity with the settlement agreement and therefore unappealable or will be a contested judgment subject to appeal should await the entry of such judgment.

"Mandamus is an extraordinary remedy. The issuance of a writ of mandamus against a judge is reserved for really extraordinary causes. Mandamus cannot be used as a substitute for appeal." Aday, et al. v. United States District Court for the Western District of Michigan, Southern Division, 318 F. 2d 588, 591, C.A. 6, and cases there cited. This case does not present such facts or circumstances as to require the issuance of the extraordinary writ of prohibition or mandamus.

It is therefore ordered that the petition for a writ of prohibition and mandamus be and it is hereby denied.

(s) Lester L. Cecil,
Circuit Judge.

UNITED STATES DISTRICT COURT
Western District of Kentucky
Louisville Division

All States Investors, Inc., Plaintiff,
vs.
The Bankers Bond Company, Inc., et al., Defendants.
} Civil Action No. 3646

JUDGMENT—Entered March 19, 1964.

Plaintiff herein, All States Investors, Inc., having filed a Motion for Judgment, in accordance with the Opinion of this Court dated October 3, 1963, the Order entered October 26, 1963, and the Opinion entered December 6, 1963, and further in accordance with the stipulation contained in the agreement executed by all parties to this cause of action dated January 23, 1963, and filed October 4, 1963; and said plaintiff, All States Investors, Inc., having made its verified certification of non-performance by defendants, The Bankers Bond Company, Inc., and Elinore Sedley, as provided in the aforesaid Opinion and Order,

It Is Hereby Ordered, Adjudged And Decreed that plaintiff's Motion for Judgment be and the same hereby is sustained; that Judgment for plaintiff, All States Investors, Inc., be and the same hereby is entered; and that said plaintiff recover from defendants, The Bankers Bond Company, Inc. and Elinore Sedley, and each of them, the sum of Two Hundred Fifty-seven Thousand and Five Hundred Dollars ($257,500.00), the further sum of $4,532.50 (for past due interest coupons numbered 6) with interest thereon at 6% per

annum from March 15, 1957, the further sum of $4,530.00 (for past due interest coupons numbered 7), with interest thereon at 6% per annum from September 15, 1957, the further sum of $4,532.50 (for past due interest coupons numbered 8), with interest thereon at 6% per annum from March 15, 1958, the further sum of $4,530.00 (for past due interest coupons numbered 9), with interest thereon at 6% per annum from September 15, 1958, the further sum of $4,532.50 (for past due interest coupons numbered 10), with interest thereon at 6% per annum from March 15, 1959, the further sum of $4,530.00 (for past due interest coupons numbered 11), with interest thereon at 6% per annum from September 15, 1959, the further sum of $4,532.50 (for past due interest coupons numbered 12), with interest thereon at 6% per annum from March 15, 1960, the further sum of $4,530.00 (for past due interest coupons numbered 13), with interest thereon at 6% per annum from September 15, 1960, the further sum of $4,532.50 (for past due interest coupons numbered 14), with interest thereon at 6% per annum from March 15, 1961, the further sum of $4,530.00 (for past due interest coupons numbered 15), with interest thereon at 6% per annum from September 15, 1961, the further sum of $4,532.50 (for past due interest coupons numbered 16), with interest thereon at 6% per annum from March 15, 1962, the further sum of $4,530.00 (for past due interest coupons numbered 17), with interest thereon at 6% per annum from September 15, 1962, the further sum of $4,532.50 (for past due interest coupons numbered 18), with interest thereon at 6% per annum from March 15, 1963, and the further sum of $4,530.00 (for past due interest coupons numbered 19), with interest thereon at 6% per annum from September 15, 1963, all the aforesaid accruals of interest being from the dates indicated to the date of this

Judgment, together with interest at the rate of 6% per annum on the aggregate of the aforesaid amounts of principal and interest from the date of this Judgment until paid, and its costs of this action, and plaintiff, All States Investors, Inc., shall have execution therefor.

The Clerk of this Court is hereby directed, upon payment of the Judgment herein rendered, to deliver to the defendants, or their counsel of record, or such of same as shall pay the Judgment rendered herein, the executed Assignment, Release and Indemnity Agreement and the Executed Guaranty Agreement of B. F. Biggers, which are referred to in the Court's Opinion of October 3, 1963, and Order of October 26, 1963, and Opinion of December 6, 1963, which said documents have been delivered to said Clerk by the plaintiff contemporaneously with the tender of this Judgment and receipted for by said Clerk; and upon delivery of said documents by said Clerk to the defendants, or their counsel of record, or each of them as shall pay the Judgment rendered therein, the persons to whom the Clerk delivers said documents shall give him their receipt therefor.

(s) Frank W. Wilson,
District Judge.

ORDER STAYING JUDGMENT—Entered March 24, 1964.

A judgment was entered in this cause upon March 19, 1964. However, since entry of the judgment the Court has further considered the allowance of interest in the said judgment, and has further considered the allegations of the complaint and the terms of the Settlement Agreeemnt with reference to the allowance of interest and is not satisfied as to the correctness of the judgment in this respect. The Court will therefore on its own motion put down an

order and motion to amend or alter the said judgment with reference to the allowance of any interest, the said motion to be in accordance with Rule 59 (e), Federal Rules of Civil Procedure. The parties will be allowed fifteen (15) days in which to submit additional authority with reference to the allowance of interest. Thereupon the Court will enter an order either affirming or modifying the judgment heretofore entered with reference to the allowance of interest.

It is, therefore, Ordered that the Judgment entered upon March 19, 1964 be stayed pending further action by the Court upon its own motion to alter or amend the said judgment with reference to the allowance of interest. The parties are to file with the Court within fifteen (15) days additional authority with reference to the allowance of interest, whereupon the Court will enter an order either affirming or modifying the judgment in this regard.

Approved for Entry.

Frank W. Wilson,
United States District Judge.

OPINION—Filed April 15, 1964.

A judgment was entered in this cause upon March 19, 1964. Because the Court felt that the matter of the allowance of interest in the judgment had not been adequately briefed by the parties and because of the Court's continuing concern over the correctness of allowing a recovery of interest in the judgment, the Court upon its own motion entered an order upon March 24, 1964 staying the judgment and ordering the parties to submit further briefs upon the issue of the allowance of interest. Briefs have now been filed by each party. Having considered the briefs, the Court is of the opinion that the allowance of interest prior to the entry of judgment would not be proper under the

facts of this case. The judgment in this case is based upon a settlement agreement entered into between the parties under date of January 23, 1963. Under the terms of the settlement agreement, upon default of performance by the defendant, a judgment was to enter "in the amount claimed in the complaint . . ." The complaint in turn alleged as follows:

> "Wherefore, plaintiff prays that all of the defendants be summoned to appear and answer herein and that upon final hearing plaintiffs have judgment over and against the defendants jointly and severally in the amount of $257,500 and interest on this judgment at the rate of 6% per annum from March 15, 1954, and for such other and further relief to which they may be entitled."

The complaint, however, states a cause of action based upon allegations of fraud and statutory violations by the defendants, not an action for recovery in accordance with the terms of the municipal bonds which form the subject matter of the lawsuit. The original suit therefore was not for a liquidated amount. The right to recover interest under the allegations of the complaint is therefore not clear. It would appear that the allowance of interest upon unliquidated claims is at most a matter of discretion with the Court. Beckman v. Time Finance Co., 334 S. W. 2d 898 (Ky., 1960); Dalton v. Mullins, 293 S. W. 2d 470 (Ky., '56); Martin v. Hales, Admnx., 288 S. W. 2d 634 (Ky., 1956). The Court is therefore of the opinion that the allowance of interest would not be proper under the facts and circumstances of this case and that the judgment as entered upon March 19, 1964, should be modified to the extent of eliminating any recovery of interest prior to the date of the entry of the judgment.

The defendants, The Bankers Bond Company, Inc. and Elinore Sedley, in addition to the filing of a brief upon the issue of the allowance of interest, have filed a motion under date of March 26, 1964, to set aside, alter, or amend the judgment and a motion under date of April 2, 1964, for leave to take further depositions in the case. The Court is of the opinion that these motions should be overruled and disallowed as they seek to reassert matters heretofore considered and reconsidered and heretofore ruled upon by the Court. The said defendants again lay considerable emphasis upon one finding of the Court in its opinion of October 3, 1963, to the effect that "the negotiations of the parties, subsequent to discovery of the loss of the bonds, resulted in a modification of the Settlement Agreement whereby the assignment, release, and indemnity agreement and guaranty agreement would be substituted in lieu of delivery of the bonds." However, as pointed out by the Court in its opinion of December 6, 1963, "Decision of the Court that the loss of the bonds did not render the agreement unenforcible was based not only upon negotiations of the parties with reference to the substitution of indemnity, but also on the law with reference to lost instruments and the facts of this case as the Court found them to be." The decision of the Court with regard to the enforcement of the settlement agreement was required as a matter of law, irrespective of whether there were or were not further negotiations between the parties subsequent to the discovery of th loss of the bonds. The Court has been deeply concerned in this case about the entry of a summary judgment in accordance with the settlement agreement of the parties. However, the terms of the settlement agreement were fixed by the parties and the agreement was knowingly, voluntarily, and intentionally entered into by the parties. The Court had nothing to do with the fixing of the terms of the

agreement. The Court has sought to extend unto the defendants every opportunity to settle this case in accordance with the settlement agreement. Time and again the Court has sought to afford unto the defendants opportunity to settle in accordance with their agreement and in accordance with the orders of the Court. The defendants, The Bankers Bond Company, Inc. and Elinore Sedley, have elected to decline to do so, leaving no alternative for the Court but to enter judgment in accordance with their agreement.

An order is accordingly being entered by the Court.

(s) Frank W. Wilson,
United States District Judge.

ORDER MODIFYING JUDGMENT AND OVERRULING DEFENDANTS' MOTIONS—Entered April 15, 1964.

This case is before the Court upon the order entered on March 24, 1964, said order entered upon the Court's own motion, staying the judgment entered herein upon March 19, 1964, pending further consideration by the Court of the allowance of interest. Having considered further the allowance of interest in the judgment, and having filed with this order an opinion thereon, in accordance with the said opinion the Court has determined that the judgment should be modified to the extent of eliminating from the judgment all allowance of interest prior to the entry of the judgment. This case is further before the Court upon a motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, filed March 26, 1964, to set aside, alter, or amend the said judgment and a motion filed by the said defendants upon April 2, 1964, for leave to take further depositions in the case. Having considered the said motions in the opinion filed with this order, the Court has for

the reasons therein set forth determined that the said motions should be overruled and disallowed.

It is therefore Ordered, Adjudged, and Decreed that the judgment entered in this cause upon March 19, 1964, be and hereby is modified and altered so as to strike therefrom all allowance of interest prior to the entry of the said judgment upon March 19, 1964. The judgment shall otherwise remain as entered for the sum of $257,500.00, together with interest at the rate of 6% per annum upon the principal sum of the judgment until paid, and the plaintiff, All States Investors, Inc., shall have execution therefor. In all other respects the judgment shall remain as entered.

It is further Ordered, Adjudged, and Decreed that the motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, filed March 26, 1964, seeking to set aside, alter, or amend the said judgment be and hereby is overruled and disallowed.

It is further Ordered, Adjudged, and Decreed that the motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, filed April 2, 1964, for leave to take further depositions be and hereby is overruled and disallowed.

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge.

MEMORANDUM AND ORDER—Entered April 23, 1964.

A motion to amend the judgment and order entered in this cause upon March 19, 1964, and April 15, 1964, has been filed in behalf of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley. The plaintiff will by motion or other response advise the Court of its position with respect to the disposition of its suit against the defendants,

J. E. Dunne, II and Mose Master, Executor of the Estate of Charles D. Dunne, and otherwise respond to the said motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley. The response of the plaintiff herein called for shall be filed within the time provided by the rules of this court. Pending the said response and the further orders of the court in this cause, it is Ordered that the issuance of execution upon the judgment and order entered herein upon March 19, 1964, and April 15, 1964, be stayed.

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge.

ORDER—Entered May 8, 1964.

It is hereby ordered and adjudged that plaintiff, All States Investors, Inc., be and is hereby given until May 15, 1964, to advise the Court, as required by Order of the Court entered April 23, 1964, of its position with respect to the disposition of its suit against the defendants, J. E. Dunne II and Moses Master, Administrator of the Estate of Charles D. Dunne, deceased, and to respond to the most recently tendered motion of defendants, The Bankers Bond Company, Inc., and Mrs. Elinore Sedley.

(s) Frank W. Wilson,
United States District Judge.

ORDER AMENDING JUDGMENT—Entered and Filed May 21, 1964.

A judgment was entered in this cause upon March 19, 1964, against the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, and in favor of the plaintiff, All States Investors, Inc. By order entered upon April 15,

1964, the said judgment was modified so as to eliminate therefrom any allowance of interest prior to the date of entry of the judgment. This cause is now before the Court upon the following motions:

(1) The motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, filed April 21, 1964, to further amend the judgment by striking therefrom the provision for issuance of execution, the said motion being upon the ground that the suit remains pending as to the parties defendant, James E. Dunne, II and Mose Master, Administrator of the Estate of Charles D. Dunne, and that the judgment against the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, is therefore not a final judgment subject to being enforced.

(2) The order entered by the Court upon April 23, 1964, temporarily staying the issuance of execution pending response unto the defendants' said motion.

(3) The response and motion of the plaintiff, All States Investors, Inc., filed May 15, 1964, to be allowed to dismiss its cause of action as to the defendants, James E. Dunne, II and Mose Master, Administrator of the Estate of Charles D. Dunne, it having been heretofore caused to appear from the record in this cause that James E. Dunne, II has complied in full with his obligations under the Settlement Agreement by delivery to The Bankers Bond Company, Inc. and Mrs. Elinore Sedley of his $15,000.00 note.

Having considered the aforesaid motions, the Court is of the opinion that the motion of the plaintiff for the entry of a judgment taking nothing of the defendant, James E. Dunne, II and for the entry of a judgment of dismissal with prejudice as to the defendant, Mose Master, Administrator of the Estate of Charles D. Dunne, should be allowed and sustained. Thereupon the Court is of the further opinion that the motion of the defendants to amend the judgment

so as to strike therefrom the provision for the issuance of execution should be overruled and that the temporary order heretofore entered April 23, 1964, staying execution should be set aside, but that, in accordance with Rule 62(a) of the Federal Rules of Civil Procedure, execution should not issue until the expiration of ten days from the entry of this order.

It is therefore Ordered, Adjudged and Decreed that the judgment entered in this cause on March 19, 1964, as modified April 15, 1964, be and hereby is amended by the addition to the end thereof the following:

> "It is Ordered, Adjudged and Decreed that the plaintiff take nothing of the defendant, James E. Dunne, II, with the costs taxed against the plaintiff.
>
> "It is Further Ordered, Adjudged and Decreed that this cause be and hereby is dismissed with prejudice as to the defendant, Mose Master, Administrator of the Estate of Charles D. Dunne, with costs taxed against the plaintiff."

It is Further Ordered, Adjudged and Decreed that the motion of the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, filed April 21, 1964, be and hereby is overruled and disallowed.

It is Further Ordered, Adjudged and Decreed that the order entered herein upon April 23, 1964, temporarily staying the issuance of execution be and hereby is rescinded but that execution for enforcement of the judgment against the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, heretofore entered shall not issue until the expiration of ten (10) days from the entry of this order.

Approved for Entry.

(s) Frank W. Wilson,
United States District Judge.
[Sitting by Designation]

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 15959

All States Investors, Inc., - - - Plaintiff-Appellee,

v.

The Bankers Bond Company, Inc., and
Elinore Sedley, - - - Defendants-Appellants.

ORDER—Filed June 2, 1964.

Before: Cecil, Phillips and Edwards, Circuit Judges.

This cause is before the Court on motion of defendants-appellants, The Bankers Bond Company, Inc., and Elinore Sedley (defendants in action No. 3646, United States District Court for the Western District of Kentucky, styled All States Investors, Inc. v. The Bankers Bond Company, Inc., et al.), to stay proceedings to enforce a judgment entered against them in said action on March 19, 1964, and amended on April 15, 1964, and May 21, 1964, pending appeal in this Court.

Upon consideration whereof it is ordered that the motion of the defendants-appellants for stay of proceedings to enforce the judgment against them be and it is hereby denied, and

It is further ordered that upon the defendants-appellants filing a supersedeas bond with the clerk of the United States District Court for the Western District of Kentucky in the amount of $257,500, in compliance with Rule 73(d), Federal Rules Civil Procedure, proceedings to enforce the

judgment shall be stayed pending the determination of the appeal in this Court.

Defendants-appellants are given leave to file a bond in accordance with this order to be approved by the clerk of the District Court, on or before Saturday, noon, June 6, 1964, and no execution for the enforcement of the judgment shall be issued prior to that time.

(s) Lester L. Cecil,
Circuit Judge.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Misc. No. 78

The Bankers Bond Company, Inc., and
Elinore Sedley, - - - Applicants-Defendants,

v.

All States Investors, Inc., - - Respondent-Plaintiff,
James E. Dunne, II and
Mose Master, Administrator of Estate of
Charles D. Dunne, Deceased, - Respondents-Defendants.

ORDER—Filed June 2, 1964.

Before: Cecil, Phillips and Edwards, Circuit Judges.

This cause is before the Court on application of The Bankers Bond Company, Inc., and Elinore Sedley for leave to take an interlocutory appeal from an alleged interlocutory order entered against them in the United States District Court for the Western District of Kentucky on

March 19, 1964, and amended on April 15, 1964, and May 21, 1964.

Upon consideration whereof and it appearing to this Court that the alleged interlocutory order is before this Court on appeal as a final judgment in case No. 15959 on the docket of the Court and that there is no compliance with section 1292(b), Title 28, U.S.C.,

It is ordered that said motion be and it is hereby denied.

(s) Lester L. Cecil,
Circuit Judge.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 15959

All States Investors, Inc., - - - Plaintiff-Appellee,

v.

The Bankers Bond Company, Inc., and
Elinore Sedley, - - - Defendants-Appellants.

ORDER—Filed June 2, 1964.

Before: Cecil, Phillips and Edwards, Circuit Judges.

This cause is before the Court on motion of All States Investors, Inc., plaintiff-appellee, to dismiss the appeal herein.

Upon consideration whereof it is ordered that said motion be and it is hereby denied.

(s) Lester L. Cecil,
Circuit Judge.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 15959

All States Investors, Inc.,
Plaintiff-Appellee,
v.

The Bankers Bond Company, Inc., Elinore Sedley,
Defendants-Appellants,
and
James E. Dunne, II, Moses Master, Administrator of the Estate of Charles D. Dunne, Deceased,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky, at Louisville.

Decided April 7, 1965.

Before: Cecil, Phillips and Edwards, Circuit Judges.

Cecil, Circuit Judge. This cause of action grew out of the issue and sale of bonds by the City of West Buechel, a Sixth Class City of the State of Kentucky. The details of this ingenious transaction are set forth in an opinion of this Court reported at Texas Continental Life Insurance Company v. Dunne, 307 F. 2d 242, and in the opinion of a District Judge reported at Texas Continental Life Insurance Company, Plaintiff v. Bankers Bond Company, Inc., Elinore Sedley, Charles D. Dunne and J. E. Dunne II, Defendants, 187 F. Supp. 14.

The Texas Continental Life Insurance Company hereinafter referred to as Texas Continental purchased $100,000

of these bonds and All States Life Insurance Company made a purchase of the bonds in the amount of $250,000. Mr. B. F. Biggers represented these insurance companies in the purchase of the bonds.

The bonds[1] subsequently defaulted and actions were brought in the United States District Court for the Western District of Kentucky by Texas Continental and All States Life Insurance Company for recovery on the bonds. The defendants were The Bankers Bond Company, Inc., Elinore Sedley, James E. Dunne II, and Moses Master, Administrator of the Estate of Charles D. Dunne, Deceased, hereinafter referred to as Bankers Bond, Mrs. Sedley and the Dunnes. The alleged causes of action were common law fraud and violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule X-10b-5 of the Securities & Exchange Commission. A trial of the Texas Continental case resulted in a disagreement by the jury. Thereafter, on motion, the District Judge granted judgment to the plaintiff. 187 F. Supp. 14. On appeal we remanded the case to the District Court for retrial. 307 F. 2d 242. The cases were then consolidated for trial. All States Investors, Inc., the plaintiff-appellee herein, and hereinafter referred to as All States Investors, is the assignee of All States Life Insurance Company. Judge Frank Wilson sitting by designation from the Eastern District of Tennessee tried the cases to a jury for three days beginning January 21, 1963.

After the noon recess, on January 23rd, the parties announced that all matters at issue between the parties in both cases had been settled. The jury was dismissed and the entry of a final order was postponed pending the closing

[1]On a preliminary motion in this case, briefed by counsel, the District Judge held that the bonds were invalid. There is no appeal from that order of January 22, 1959, and we accept it as a final adjudication of the issue.

of the settlement by the parties within thirty days. The settlement between the plaintiff Texas Continental and the defendants having been consummated, according to the agreement, we are not further concerned with that case. Upon failure of the parties in the other case to consummate the settlement agreement, Judge Wilson granted a judgment against Bankers Bond and Elinore Sedley in the sum of $257,500 plus interest, in favor of the plaintiff All States Investors. It is this judgment and the procedure by which it was obtained that is now before us on this appeal.

For the purposes of this review, the pertinent provisions of the settlement agreement between All States Investors and the defendants are as follows:

1. An action pending in Texas between All States Investors, and James E. Dunne, II, was to be dismissed with prejudice and without award of costs of either party.

2. Bankers Bond and Mrs. Sedley were to purchase, at the time of closing, from All States Investors $250,000 of the face amount of the West Buechel revenue bonds for $90,000 and a promissory note with Bankers Bond and Mrs. Sedley as makers in the amount of $15,000. The note was to be paid in five equal annual installments of $3,000 each without interest. In the event of default, there was an acceleration clause making the entire balance due with interest at 6% from date of default.

3. Closing was to be within thirty days from the execution of the agreement.

4. The parties were to release liability on United States Government Bonds in the face amount of $150,000 held as collateral security by Fidelity and Deposit Company of Maryland, surety upon a supersedeas bond in the Texas Continental case.

5. The West Buechel bonds were to be delivered simultaneously with the payment of the money and the delivery

of the note. Mutual releases were to be exchanged between the parties.

6. Upon consummation of the closing of the settlement agreement, an order was to be entered dismissing the case with prejudice.

7. Item (4) of the agreement provided in part:

> "To avoid further delay, hardship, inconvenience, or costs to the parties, this agreement contains a stipulation with respect to the event of failure of the defendant to consummate this transaction of a nature which will vest jurisdiction and right in this Court to make and enter the order hereinafter provided."

The stipulation to which reference is made is as follows:

> "If the Bankers Bond Company and Mrs. Elinore Sedley, or either of them, shall fail, within the time herein provided for consummation and closing of this agreement, to carry out and perform their obligations thereunder, as hereinabove provided, this Court shall have the right, authority and jurisdiction, upon certification of such fact by counsel of record for each of the plaintiffs, without notice or the necessity for the hearing of any further evidence, forthwith to enter a judgment in each case in amount claimed in the complaint against the defendants, The Bankers Bond Company and Mrs. Elinore Sedley, and a joint judgment in both cases against the defendant, James E. Dunne, II, in the amount of $15,000 and said defendants hereby waive any right which they might have to appeal or seek to appeal from the judgment so entered."

It was further stipulated that the West Buechel bonds, which were the property of All States Investors, were in the possession of the Honorable Martin R. Glenn, Clerk of

the United States District Court, at Louisville. The agreement was signed by Henry R. Heyburn and Ira Lee Allen as attorneys for Texas Continental Life Insurance Co., by Henry W. Strasburger as attorney for All States Investors, Inc., by A. Berkowitz and J. C. Satterfield as attorneys for The Bankers Bond Company, Inc., by Henry J. Stites as attorney for James E. Dunne, II, by G. Charles Childre, president of the Texas Continental Life Insurance Co., by Tyrus R. Davis, president of The Bankers Bond Company, Inc., by Mrs. Elinore Sedley, and by James E. Dunne, II. The District Judge filed a copy of the agreement with the Clerk of the Court on October 10, 1963.

On February 21, 1963, the parties met and Bankers Bond and Mrs. Sedley tendered performance of their obligations in accordance with the agreement. All States Investors was unable to deliver the West Buechel bonds and the agreement was not consummated. It developed that the Clerk of the Court did not have the bonds and the parties were unable to locate the bonds or account for them.

On April 18, 1963, counsel for plaintiff-appellee moved for judgment for $250,000 (sic) with interest from 1957. Judge Wilson heard the motion on April 27th. The lawyers and all parties were present. In the meantime, All States Investors had obtained an indemnity agreement of both All States Investors and B. F. Biggers. It had dismissed the action in Texas according to agreement. It had also released the government bonds which had been held by Fidelity and Deposit Company of Maryland which was required in order that Bankers Bond and Mrs. Sedley could meet their payment of $90,000 to All States Investors. At the hearing of April 27th, Judge Wilson directed counsel for appellee to file an amended motion for judgment which would insure that all issues presented by the failure to

consummate the settlement agreement would be before the Court. Such an amended motion was filed on May 6, 1963.

Judge Wilson decided this motion in an opinion filed October 4, 1963. He found that on the basis of the record the bonds in question were, by accident and without fault or intention of anyone, lost, stolen or misplaced. He further found that the plaintiff had tendered an assignment, release and indemnity agreement by which it warranted ownership of the bonds, made an assignment of them to Bankers Bond, released the defendants from any claims arising out of the bonds and agreed to indemnify the defendants against any loss by reason of failure to produce them. The indemnity agreement was guaranteed by B. F. Biggers and Judge Wilson found it to be adequate security.

Judge Wilson also found that in accordance with the settlement agreement, the plaintiff dismissed with prejudice its pending lawsuit in Dallas, Texas, that the defendant James Dunne, II, delivered his note for $15,000 payable to Bankers Bond and Mrs. Sedley, and the Bankers Bond and Mrs. Sedley received and retained this note.

Judge Wilson said:

> "The Court finds that all of this, when considered together, constitutes substantial performance of the settlement agreement upon the part of the plaintiff and that the failure to deliver the bonds under the circumstances does not constitute a material failure of performance on the part of the plaintiff."

He also found that the negotiations of the parties subsequent to the discovery of the loss of the bonds constituted a modification of the agreement.

Judge Wilson ordered the parties "to effect a closing in accordance with the settlement agreement with delivery of the executed assignment, release, and indemnity agreement

of the plaintiff and the executed guaranty agreement of B. F. Biggers being made in lieu of the delivery of the bonds." He fixed a new closing date of October 21, 1963. He further held that in event of further default by the defendants and upon proper tender by plaintiff, a "summary judgment" would be entered against the defendants.

On October 21, 1963, a motion was filed on behalf of Bankers Bond and Mrs. Sedley requesting the court to withdraw its opinion of October 4th and overrule the motion of plaintiff for judgment. October 23rd, a further motion was filed to substitute new counsel of record for the defendants. On October 22nd, counsel for plaintiff filed a motion certifying the default of defendants to consummate the settlement on October 21st, and for judgment in the amount of the original complaint. By order of October 26th the court denied the motion to withdraw the opinion of October 4th and granted the defendants leave to substitute new counsel. November 12, 1963, was fixed as a new closing date and the parties were ordered to consummate the settlement in the same manner as provided for the October 21st settlement date.

In an opinion filed December 6, 1963, Judge Wilson passed on motions and a petition with response of Bankers Bond and Mrs. Sedley, as follows: November 8th, Bankers Bond and Mrs. Sedley for leave to file an answer and third-party complaint; November 12th, same parties for leave to file a transcript of the proceedings held on April 27, 1963; November 13th, All States Investors, for judgment; November 30th, A. Berkowitz, former attorney for defendants Bankers Bond and Mrs. Sedley, to strike third-party complaint.

The court said in part:

> "Taking up first the motions on behalf of the defendants, The Bankers Bond Company, Inc. and

Elinore Sedley, the Court is of the opinion that the motions should be disallowed. In essence the defendants, The Bankers Bond Company, Inc. and Elinore Sedley, seek to disregard all that has heretofore occurred in this lawsuit, all of the orders heretofore entered, the agreement which they are parties to in person as well as by counsel, and after five years of litigation, by the device of changing counsel and repudiating the authority of former counsel, seek to file a new answer and recommence their defense of this litigation. In addition, by 'third-party complaint,' they seek to institute a new lawsuit against their former counsel. This procedure is unknown to the Court and no authority for it is cited. The Court carefully considered its opinion with regard to the enforcement of the settlement agreement in view of the loss of the subject municipal bonds. Decision of the Court that the loss of the bonds did not render the agreement unenforcible was based not only upon negotations of the parties with reference to the substitution of indemnity, but also on the law with reference to lost instruments and the facts of this case as the Court found them to be. The Court carefully reconsidered its opinion in this regard in light of the defendants' motion to reconsider and the defendants' denial of authority of its former counsel before overruling the motion to reconsider.

"Now, by motion to be allowed to file a new answer and a third-party complaint, the defendants would disregard the clear rulings and orders heretofore lawfully and properly entered and start anew. The only apparent justification asserted by the defendants for this procedure is that they now have new counsel and wish to proceed upon his advice and to repudiate the authority of their former counsel to represent them.

Opinion

The record would seem to reflect that the defendants have of their own volition added or dropped no less than five attorneys in the past year of this litigation alone. The Court is unable to find any merit in the defendants' contentions with reference to former counsel having acted without authority or without knowledge of the defendants. The record reflects that the defendants were most ably represented during the time of which they now complain. The authority of the defendants' former attorneys is questioned by the defendants only with reference to negotiations in regard to acceptance of indemnity in place of the lost, stolen, or misplaced bonds. It is fundamental that a party is bound by the actions of his attorney, in the absence of fraud or collusion, 7 C.J.S., 'Attorney and Client,' Sec. 80; 5 Am. Jur., 'Attorney at Law,' Sec. 85, *et seq*. Not only is there a total absence of fraud or collusion, but on the contrary the record reflects that the defendants personally approved the settlement agreement as evidenced by their signatures on the agreement. The record reflects that they were personally present at the hearing before the Court on the motion to enforce the settlement agreement when there was a full discussion of the matters now complained of. Furthermore, the Court's opinion with regard to the enforcement of the settlement agreement by substitution of the indemnity agreement for the lost, stolen, or misplaced bonds was based upon the law with reference to lost instruments, and the fact that the plaintiff had already partially performed under the agreement by dismissal with prejudice another lawsuit, as well as the negotiations between the parties. The legal conclusion reached by the Court with regard to the enforcement of the agree-

ment would have been required in the absence of any negotiations between the parties with regard to indemnity."

The court denied the motion of Bankers Bond and Mrs. Sedley for leave to file an answer and third-party complaint and held that in effect that disposed of the petition of A. Berkowitz. The motion to file a transcript of the proceedings of April 27th was allowed. We agree with the rulings of the trial judge on these motions and find no merit on this appeal to the assignments of error based on such rulings.

The court sustained the motion of All States Investors and granted judgment (March 19, 1964) to it in the amount of $257,500, plus accrued interest on coupons, and in the interest accrued on the various amounts from the date they became due. This judgment was subsequently amended (April 15, 1964) to include only $257,500 plus interest on that amount from March 19, 1964. This judgment was further amended (May 21, 1964) to read that All States Investors take nothing from defendant, James E. Dunne II, and that the cause of action against defendant, Moses Master, Administrator of the Estate of Charles D. Dunne,* be dismissed with prejudice. The pertinent question on this appeal is whether the District Judge committed error in granting judgment to the plaintiff-appellee.

We consider first whether the District Judge had the authority to enforce the settlement agreement within the original action out of which the agreement arose. The agreement provided that immediately upon the consummation of the closing of the transaction an order of dismissal was to be entered. The court thus retained jurisdiction of the case pending the closing of the settlement agreement and we are of the opinion that it had the authority and duty

*Defendant Charles D. Dunne died during the pendency of this action.

to adjudicate the issues presented in its enforcement. The court said in Cummins Diesel Michigan, Inc. v. The Falcon, etc. and W. C. Wright, etc., 305 F. 2d 721, at 723:

> "Federal and State Courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court. (Citations) We need not further labor this phase of the case. The findings incorporated in the decree are supported by the record and the authorities justify the action of the Court."

In Melnick v. Binenstock, 318 Pa. 533, 179 A. 77 at 78, the Court said:

> "A compromise or settlement of litigation is always referable to the action or proceeding in the court where the compromise was effective; it is through the court the carrying out of the agreement should thereafter be controlled. Otherwise the compromise, instead of being an aid to litigation, would be only productive of litigation as a separate and additional impetus."

See also, American Textile Machine Corp. v. United States, 220 F. 2d 584, 587-589, C. A. 6. No cases to the contrary from Kentucky or elsewhere have been cited to us nor have we found any.

At the outset we are confronted with the question of substantial performance, on the part of All States Investors. In this regard we are concerned only with the failure of All States Investors to deliver the bonds to Bankers Bond.

The District Judge found that the parties were mutually mistaken at the time of the agreement as to the location of the bonds. He further found that the bonds were lost, stolen or misplaced through no fault of the plaintiff-

appellee. All States Investors executed an assignment of the bonds to Bankers Bond and a release of Bankers Bond and Mrs. Sedley from any liability arising out of the bonds. In addition All States Investors and B. F. Biggers executed a guaranty against loss which the District Judge held to be adequate security. The bonds were in default, were generally regarded as worthless and had been adjudicated invalid. Although not actually adjudicated the trial judge expressed the opinion that any recovery on the bonds was barred by the statute of limitations.

Under these circumstances we are of the opinion that the failure to deliver the bonds was not a material variance from the terms of the contract and would not excuse performance on the part of the defendants Bankers Bond and Mrs. Sedley. We agree with the trial judge that there was substantial performance on the part of All States Investors, and that the failure to deliver the bonds, under the circumstances, did not constitute a material failure of performance. Kentucky follows the doctrine of "substantial performance." See Hutcheson v. Creel & Co., 12 Ky. 349, 352, and City of Newport v. Newport & C. Bridge Co., 90 Ky. 193, 13 S. W. 720, 721.

The trial judge found that the parties had modified the agreement and that All States Investors was entitled to have it enforced in its modified form. The record is not clear on this point and having concluded that there is no material variance we do not reach that question.

We come now to the question of whether the trial judge committed error in granting judgment to the plaintiff-appellee in accordance with the stipulation of the agreement. Counsel contends that this is not in compliance with Rule 56 of the Federal Rules of Civil Proceedure relating to summary judgment. This rule is not applicable to the situation in the case before us. We have here a judgment entered by stipulation and agreement of the parties.

Neither is the judgment barred by Section 372.140 of K.R.S.[2] It is neither a judgment by confession nor a judgment entered before an action is instituted. It is in the nature of a judgment by consent.[3] We know of no reason why parties cannot stipulate to a judgment being entered upon the happening of a certain event which can be determined with certainty. No valid reason has been advanced contra. Finding as we do that there was no material variance in the performance of the agreement on the part of All States Investors which would excuse performance by Bankers Bond and Mrs. Sedley, we conclude that the judgment was properly entered.

Having complied with the terms of the settlement agreement, the District Judge dismissed the Dunnes from the action. The appellants, Bankers Bond and Mrs. Sedley, appealed from this dismissal. Counsel for the appellants made no claim in his opening brief against the Dunnes. In his reply to the Dunnes' brief, counsel says, "(I)t is appellants' contention on this appeal that the action should have been dismissed as to each of the defendants, and if in error on that contention, then the Dunnes should be subject equally, with the appellants, in any further proceedings, that may be ordered."

Since we find no error in granting judgment against the appellants and order no further proceedings herein, the judgment of the District Court as to all parties is affirmed.

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[2] "(1) Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.

"(2) No person shall appear for a defendant under any such power in any court in this state."

[3] "A consent decree is an agreement of the parties under the sanction of the court as to what the decision shall be." See The Ansaldo San Giorgio I, 73 F. 2d 40, 41, and authorities cited therein.

ORDER—Filed May 20, 1965.

Before: Cecil, Phillips and Edwards, Circuit Judges.

This cause is before the Court upon motion of the defendants-appellants, The Bankers Bond Company, Inc., and Elinore Sedley, for an order to require the Clerk of the United States District Court, for the Western District of Kentucky, to transmit to the Clerk of this Court the record from said District Court in case No. 4803, All States Investors, Inc. v. Elinore Sedley, in support of the petition of The Bankers Bond Company, Inc., and Elinore Sedley for rehearing.

The cause is further before the Court on petition of the defendants-appellants, The Bankers Bond Company, Inc., and Elinore Sedley, for a rehearing on the appeal before this Court and its decision of April 7, 1965.

This Court cannot supplement the record on appeal with material that was not in the record of the case in the trial court.

Therefore, the motion to transmit to the Clerk of this Court the record in case No. 4803 from the District Court, for the Western District of Kentucky, is denied.

Upon consideration of the petition for rehearing, it is ordered that it be and is hereby denied.

Entered by order of the Court.

(s) Carl W. Reuss, Clerk.

ORDER STAYING MANDATE—Filed June 1, 1965.

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by order of the Court.

(s) Carl W. Reuss, Clerk.

In the

UNITED STATES DISTRICT COURT

For the Northern District of Texas

Dallas Division

W. R. Williford, Et Al.,
Plaintiffs,

v.

Professional and Business Men's Insurance Company, a Corporation Formerly Known As All States Life Insurance Company, Et Al.,
Defendants.

Civil Action No. 8576

DECREE APPROVING COMPROMISE SETTLEMENT SUBJECT TO NOTICE AND COMPLIANCE THEREWITH AS HEREIN PROVIDED—Filed April 26, 1963.

This Cause came on to be heard by the Court at 3:00 P.M., April 10, 1963, the time set for Pretrial.

Appearing in open court were counsel for all the parties, namely:

Messrs. Angus G. Wynne and William A. McKenzie, of Wynee, McKenzie, Jaffe & Tinsley, Dallas, Texas, and Mr. A. Berkowitz of Berkowitz & Lefkovits, Birmingham, Alabama, Attorneys for Plaintiffs.

Mr. Henry W. Strasburger of Strasburger, Price, Kelton, Miller & Martin, Dallas, Texas; Messrs. H. T. Bowyer and H. Bascom Thomas of Bowyer & Thomas, Dallas, Texas; and Mr. William P. Fonville and Irving L. Goldberg of Goldberg, Fonville, Gump & Strauss, Dallas, Texas, Attorneys for the Defendants.

Decree Approving Compromise Settlement, Etc.

Counsel for the parties submitted in open court for approval an agreed compromise settlement of the claims asserted in this cause.

The said compromise settlement agreement having been considered and understood, and the Court finding the same to be in the best interest of all parties, it is by the Court approved and accordingly Ordered, Adjudged and Decreed as follows:

I.

An equitable trust is hereby declared and impressed in favor of the Defendant, Professional and Business Men's Insurance Company, a corporation, and against the Defendants (except All States Investors, Inc., and B. F. Biggers, individually) in and upon One Hundred Twenty Thousand (120,000) shares of the common stock of said corporation out of the holdings of said Defendants in such stock, said 120,000 shares being the same 120,000 shares as described in the next succeeding paragraph of this judgment.

Accordingly, judgment is rendered in favor of the Plaintiffs for the use and benefit of Professional and Business Men's Insurance Company, a corporation, against B. F. Biggers as Executor and Trustee of the Estates of Jessie C. Biggers and William C. Biggers, B. F. Biggers as Trustee of the Barbara Sue Biggers and Douglas Grant Biggers "A", "B", "C", "D", "E", and "Trustee" Trusts, in the amount of Sixty Thousand (60,000) such shares, and against the Defendants Willis M. Beavers, Alvin M. Owsley, W. N. Blanton, Sr., Fred H. Korth, Willard W. Rollins and William O. Stevens, in the amount, as to each, of Ten Thousand (10,000) such shares.

Each of said Defendants, pursuant to this Decree, in discharge and satisfaction thereof and in accordance with this Order, shall deposit out of their holdings of such stock

in Professional and Business Men's Insurance Company, a corporation, stock certificates representing the shares described in the next preceding paragraph of this judgment, duly and properly endorsed all in the manner as hereinafter provided.

Defendants respectively are hereby directed and ordered to forthwith deposit with the Clerk of this Court such shares as herein ordered by each, properly endorsed in blank, to be forwarded by the Clerk to Professional & Business Men's Insurance Company upon confirmation and approval of this decree as provided in Paragraph IV hereof, and upon compliance with Paragraph VIII.

In aid and enforcement of said equitable trust hereinabove declared and impressed, a lien is hereby declared upon said 120,000 shares of stock for which judgment is hereby entered.

Professional and Business Men's Insurance Company, upon receipt of the certificates representing said 120,000 shares, shall (a) immediately issue 36,000 shares of its stock to the attorneys for plaintiffs as fair and reasonable compensation as attorneys' fees for their services herein in behalf of Professional and Business Men's Insurance Company, including reimbursement of all costs and expenses as provided in Paragraph V hereof; (b) immediately upon the issuance and delivery of said 36,000 shares mentioned hereinabove in (a), cancel and extinguish the 120,000 shares of stock; (c) execute and deliver to each defendant its receipt for the number of shares so received from each; and (d) thereupon immediately certify to the Clerk of this Court the fact of such receipt and of such extinguishment and cancellation and the issuance of said 36,000 shares, whereupon the aforementioned lien shall be fully satisfied.

II.

The Court hereby finds this to be a derivative class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure, requiring notice of the proposed compromise settlement hereof under Sub-division (c)of said Rule. The Court orders that notice of said compromise settlement be given in the manner and form attached hereto and that such notice be published in the Wall Street Journal, national edition, a newspaper of general circulation, which publication shall be made on the 3 and 6 days of May, 1963, and at the cost and expense of Professional and Business Men's Insurance Company. A copy of such published notice shall be filed in the papers in this Cause.

III.

The Court finds that the said compromise settlement agreement was, at the annual meeting duly called upon notice by the company and adjourned to and held on April 19, 1963, submitted to, ratified and approved by a vote of all the stockholders represented thereat, the Defendants abstaining from voting thereon, and a resolution to that effect has been spread upon the minutes of the meeting in the minute book of the company.

IV.

Following the notice by publication as hereinabove provided and ordered to be made, this Decree shall lie over for its final confirmation and approval until May 15, 1963, at 10:00 A.M. in Chambers, at which time the Court will hear and consider all objections, if any thereto.

Any objections to such final confirmation and approval by this Court shall be made in writing and filed with the Clerk of this Court not later than May 13, 1963.

V.

It is the Order of the Court that Plaintiffs' attorneys of record, Wynne, McKenzie, Jaffe & Tinsley, Dallas, Texas, and Berkowitz & Lefkovits, Birmingham, Alabama, be awarded as fair and reasonable compensation for their services herein in behalf of Professional and Business Men's Insurance Company as attorneys' fees, including reimbursement of all costs and expenses, Thirty Six Thousand (36,000) shares of the common stock of Professional and Business Men's Insurance Company, and a lien in favor of said counsel is declared and fixed on said 120,000 shares mentioned in Paragraph I hereof.

In satisfaction and payment of the compensation of counsel for plaintiffs for their services in behalf of Professional and Business Men's Insurance Company as above mentioned, said Company shall, immediately following the delivery to it by the United States District Clerk of the certificates representing said 120,000 shares, issued in such number of certificates and multiples thereof as William A. McKenzie, Attorney at Law, 2808 Southland Center, Dallas, Texas, may request 18,000 shares of its common stock to the law firm of Wynne, McKenzie, Jaffe and Tinsley of Dallas, Texas, and 18,000 shares of its common stock to Berkowitz & Lefkovits, Attorneys at Law of Birmingham, Alabama, the delivery thereof to be made to William A. McKenzie, Attorney at Law, whose receipt therefor issued to the Clerk of this Court shall fully discharge and satisfy this part of the decree. All of said 36,000 shares shall be unencumbered and all stock issuance and/or transfer taxes, if any, shall be paid by Professional and Business Men's Insurance Company. Delivery of such certificates to William A. McKenzie shall be made immediately, and within not exceeding five days from receipt of his instructions as to how such stock is to be issued.

VI.

This Decree, and the final decree and confirmation thereof to be entered, if so confirmed and approved by this Court at the time fixed therefor, shall not be construed as an admission by the Defendants against whom judgment is rendered hereinabove of any liability with respect to any of the claims asserted and charged in the amended complaint. If this compromise settlement agreement shall not be confirmed by the Court for any reason, this cause shall stand and remain pending on the docket of this Court, in all respects, as if said compromise settlement agreement had not been made, without prejudice to the rights of any of the parties hereto, and the stock delivered to the United States District Clerk in accordance with this Order shall be forthwith redelivered to the Defendants.

VII.

No objections having been filed within the time and in the manner required hereinabove, and any being made having been heard, considered and overruled, the Defendants having fully complied with the terms of this Decree, any and all other claims or causes of action of the plaintiffs are denied with prejudice, and all Defendants, their heirs, representatives, successors, and assigns, and all other shares of stock of Professional and Business Men's Insurance Company owned by defendants, or any of them, shall stand forever released from any and all liability of any kind claimed, asserted, demanded or arising out of this cause of action or the transactions alleged in connection therewith.

VIII.

Immediately following the entry of final decree approving said compromise settlement agreement and judgment, counsel for plaintiffs shall cause a judgment to be entered

in that certain action pending in the 14th Judicial District Court of Dallas County, Texas, styled E. J. Love, et al. v. Professional and Business Men's Life Insurance Company, et al., and being No. 62033-F/A on the docket of said Court, ordering said cause dismissed with prejudice in the manner provided for by Rule 42, Texas Rules of Civil Procedure, with all costs taxed against the Plaintiffs.

IX.

This Decree shall be construed as a final decree nisi subject only (a) to such objections as may be made thereto and heard thereon, and (b) the full performance and compliance by the Plaintiffs and Defendants with each and all the terms hereof.

X.

Jurisdiction of this cause and the parties hereto is reserved by the Court for such further and other decrees as may be necessary for the enforcement hereof or such other purposes as may be necessary.

Dated this 26th day of April, 1963.

(s) Sarah T. Hughes,
Judge of the United States District
Court for the Northern District
of Texas, Dallas Division.

Approved, Subject to Approval of Court,
and Approved as to Form:

Berkowitz & Lefkovits,
Suite 505, Bank for Savings Bldg.,
Birmingham, Alabama,

Wynne, McKenzie, Jaffe & Tinsley,
2808 Southland Center,
Dallas, Texas,

By (s) William A. McKenzie,
Attorneys for Plaintiffs.

(s) Henry W. Strasburger,
Attorney for Defendants, All States Investors, Inc., B. F. Biggers, individually, B. F. Biggers as Executor and Trustee of the Estates of Jessie E. Biggers and William C. Biggers, B. F. Biggers as Trustee of Barbara Sue Biggers and Douglas Grant Biggers "A", "B", "C", "D", "E", and "Trustee" Trusts,
Fidelity Union Tower Building,
Dallas, Texas.

(s) Bascom Thomas & H. T. Bowyer,
Attorneys for Defendants, Willis M. Beavers, Alvin M. Owsley, W. N. Blanton, Sr., Fred H. Korth, Willard W. Rollins and William O. Stevens,
Praetorian Life Building,
Dallas, Texas.

(s) William P. Fonville,
Attorney for Defendant, Professional and Business Men's Insurance Company,
Republic National Bank Building,
Dallas, Texas.

LEGAL NOTICE.

Civil Action No. 8576 in the United States District Court for the Northern District of Texas, Dallas Division, entitled W. R. Williford, et al. vs. Professional & Business Men's Insurance Company, et al., and Cause No. 62033-F/A in the 14th Judicial District Court of Dallas County, Texas, entitled E. J. Love, et al. vs. Professional & Business Men's Life Insurance Company, et al., were brought as class actions and derivative suits by certain stockholders of said Company. A compromise of said suits has been approved by the stockholders of said Company and by the Judge of the United States District Court. In said causes the plaintiffs sued on behalf of themselves and other stockholders similarly situated, and on behalf of the Company, charging the defendants with failure to comply with certain Federal and State statutes and regulations with reference to securities, and with various other alleged irregularities in the sale of stock and operation of the Company, all of which allegations were denied by the defendants. Summarized, the material terms of the approved settlement are that 120,000 shares of the common stock of the Company now standing in the names of certain defendants will be impressed with a trust in behalf of the Company and thereupon cancelled and extinguished. The Company will issue 36,000 shares of its common stock to the plaintiffs' attorneys as their fees, costs, and expenses for their services in said suits, and the above-captioned suits in the State Court will be dismissed with prejudice. Judgment finally approving said settlement and ordering same carried into effect will be entered in the United States District Court unless good cause is shown to the contrary. Any stockholder owning stock in said Company from July 1, 1955, to date, having any valid objection to the final approval of the compromise, shall file written objection thereto with the

Clerk of the United States District Court, U. S. Courthouse, Dallas, Texas, and Bill Shaw, District Clerk of Dallas County, Records Building, Dallas, Texas, on or before May 13, 1963, setting forth the facts upon which such objection is based.

By Order of

Sarah T. Hughes,
U. S. District Judge.

John A. Lowther,
U. S. District Clerk,

By (s) Elizabeth McClellon,
Deputy.

FINAL DECREE—Filed May 15, 1963.

This Cause came on for hearing in open court on this the 15th day of May, 1963, Plaintiffs appearing by and through one of their respective attorneys of record, William A. McKenzie, of Wynne, McKenzie, Jaffe & Tinsley, Dallas, Texas, and the Defendants appearing by and through their respective attorneys of record, Mr. Henry W. Strasburger, of Strasburger, Price, Kelton, Miller & Martin, Dallas, Texas; Messrs. H. T. Bowyer and H. Bascom Thomas, of Bowyer & Thomas, Dallas, Texas; and Mr. William P. Fonville, of Goldberg, Fonville, Gump & Strauss, Dallas, Texas.

Counsel for Plaintiffs and Defendants having filed with the papers of this cause copies of the legal notice heretofore ordered by the Court on April 26, 1963, to be published in the Wall Street Journal, National Edition, on May 3, 1963 and May 6, 1963, and the Court having examined same and finding same to comply with the order of the Court, and the Court having inquired of the United States District Clerk as to whether or not any objections to the

compromise settlement had been filed in accordance with the order approving the compromise settlement, and the Clerk having reported to the Court that no such objections had been filed to the compromise settlement, the Court finds that said compromise settlement is a fair and equitable settlement, and it is the order of the Court that same be, and it is hereby in all things, confirmed and approved.

It is the order of the Court that the United States District Clerk shall immediately upon the entry of this Order deliver to Mr. William P. Fonville, Attorney for Professional and Business Men's Insurance Company, the one hundred twenty thousand (120,000) shares of the common stock of Professional and Business Men's Insurance Company heretofore deposited with said Clerk by the Defendants and that Mr. William P. Fonville, as counsel for Professional and Business Men's Insurance Company, shall immediately deliver said shares to Professional and Business Men's Insurance Company. It is ordered that thirty-six thousand (36,000) shares of the common stock of Professional and Business Men's Insurance Company be issued as fair and reasonable compensation to Wynne, McKenzie, Jaffe & Tinsley, Dallas, Texas, and Berkowitz & Lefkovits, Birmingham, Alabama, for their services, in accordance with the Court's order of April 26, 1963, and the request of William A. McKenzie directed to Professional and Business Men's Insurance Company by certified mail on the 9th day of May, 1963. It is the further order of the Court that Professional and Business Men's Insurance Company issue said stock immediately in the multiples requested by William A. McKenzie by certified mail on the 9th day of May, 1963, same to be delivered to William A. McKenzie at 2808 Southland Center, Dallas, Texas, and upon delivery, William A. McKenzie shall issue his receipt therefor to the United States District Clerk, all in accordance with the Court's order of April 26, 1963.

Final Decree

The Court finds that the Defendants have fully complied with the terms of the Decree of April 26, 1963, and it is, accordingly, the order of the Court that any and all other claims or causes of action of the Plaintiffs be, and they are hereby, denied with prejudice, and all Defendants, their heirs, representatives, successors and assigns, and all other shares of stock of Professional and Business Men's Insurance Company owned by Defendants, or any of them, shall stand forever released from any and all liability of any kind claimed, asserted, demanded or arising out of this cause of action or the transactions alleged in connection therewith.

It is the further order of the Court that all court costs shall be taxed against the Plaintiffs.

Dated this 15th day of May, 1963.

(s) Sarah T. Hughes,

Judge of the United States District Court for the Northern District of Texas, Dallas Division.

Approved and Agreed:

Berkowitz & Lefkovits,
Suite 505, Bank for Savings Bldg.,
Birmingham, Alabama,

Wynne, McKenzie, Jaffe & Tinsley,
2808 Southland Center
Dallas, Texas,

By (s) William A. McKenzie,
Attorneys for Plaintiffs.

(s) Henry W. Strasburger by Boyd Waggoner,
Attorney for Defendants, All States Investors, Inc., B. F. Biggers, in-

dividually, B. F. Biggers as Executor and Trustee of the Estates of Jessie E. Biggers and William C. Biggers, B. F. Biggers as Trustee of Barbara Sue Biggers and Douglas Grant Biggers "A", "B", "C", "D", "E", and "Trustee" Trusts,
Fidelity Union Tower Building,
Dallas, Texas.

(s) H. Bascom Thomas & H. T. Bowyer,
Attorneys for Defendants, Willis M. Beavers, Alvin M. Owsley, W. N. Blanton, Sr., Fred H. Korth, Willard W. Rollins and William O. Stevens,
Praetorian Life Building,
Dallas, Texas.

(s) William P. Fonville,
Attorney for Defendant, Professional and Business Men's Insurance Company,
Republic National Bank Building,
Dallas, Texas.

THE CONSTITUTION OF THE UNITED STATES.

Seventh Amendment.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

UNITED STATES CODE.

28 U.S.C. 1291, page 5015.

1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 929; October 31, 1951, ch. 655, Section 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, Section 12(e), 72 Stat. 348.)

28 U.S.C. 1292(4-b), page 5017.

Section 1292. Interlocutory decisions.

(4-b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. 1331, page 5019.

Section 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where in the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. 1332(a)(1), page 5020.

Section 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds

the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States.

28 U.S.C. 1391, page 5030 (Securities Act of 1933).

Section 1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

15 U.S.C. 77v(a), page 2414.

Section 77v. Jurisdiction of offenses and suits.

(a) The district courts of the United States, and the United States Courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

15 U.S.C. 78aa, page 2466 (Securities Exchange Act).

Section 78aa. Jurisdiction of offenses and suits.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

KENTUCKY REVISED STATUTES.

372.140 Power of attorney to confess judgment; release of errors. (1) Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.

(2) No person shall appear for a defendant under any such power in any court in this state.

372.990 Penalties. Any person who violates any of the provisions of subsection (2) of KRS 372.140 shall forfeit one thousand dollars to the defendant, and shall be liable to damages at the suit of the party aggrieved.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 3. Commencement of Action. A civil action is commenced by filing a complaint with the court. (Adopted, 1938.)

Rule 38. Jury Trial of Right.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after

the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. (Adopted, 1938.)

Rule 54. Judgments; Costs.

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings. (Adopted, 1938.)

(b) JUDGMENT UPON MULTIPLE CLAIMS. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the

action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. (As Amended by order of Supreme Court on Dec. 27, 1946.)

(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) COSTS. Except when express provision thereof is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. (Adopted, 1938.)

Rule 56. Summary Judgment.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

GAVIN H. COCHRAN,
712-725 Kentucky Home Life Bldg.,
Louisville, Kentucky,

HENRY R. HEYBURN,
CLAY L. MORTON,
Louisville, Kentucky,

HENRY W. STRASBURGER,
ROYAL H. BRIN, JR.,
Dallas, Texas,

Attorneys for Respondents,
ALL STATES INVESTORS, INC.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - *Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of Estate
of Charles D. Dunne, Deceased, - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

RESPONDENTS' STATEMENT OF THE CASE.

The pertinent facts of this case are stated in the opinion of the Court of Appeals for the Sixth Circuit (Petitioners' Appendix, pp. 88-99). While respondent accepts most of petitioners' statement of the case, some parts are clearly erroneous and unsupported by the record.

Contrary to counsel's statement (Petition, p. 9), the settlement agreement was substantially performed

by plaintiff by tender of the assignment, release and indemnity and by doing the numerous other acts required by the agreement.

Counsel's contentions that former counsel for defendants attempted, in effect, to pressure his clients to agree to a modification of the settlement agreement are not supported by any reasonable interpretation of the record. Petitioners were present at and participated in the negotiations of which they now complain; and, as pointed out in the trial judge's opinion, quoted by the Court of Appeals, petitioners' handling of the case since October 1963, represents in effect a belated attempt to deny facts previously stipulated or admitted and to repudiate acts of former counsel who had served them long, faithfully and efficiently for five years (Petitioners' Appendix, pp. 65-67, 95).

The statement that the bonds were worth $105,000.00 until February 21, 1963 (Petition, p. 15) is inaccurate and contrary to the express stipulation of the parties in a pre-trial order. (See Judge Wilson's opinion of October 4, 1963, Petitioners' Appendix, p. 52.)

REASONS FOR DENYING THE WRIT.

Petitioners Fail to Cite Any Grounds for Review Provided for in Rule 19 or Otherwise Recognized by This Court.

The judgment of the Court of Appeals for the Sixth Circuit, of which review is now sought, has no substantial bearing on what have been recognized by this Court as proper subjects for review, such as matters affecting public policy or the public interest,

problems of recurring importance or new, novel or important questions of federal law. Petitioners' allegations that due process of law has been denied them and that there are conflicts between circuits as to some issues are completely without merit. What is involved in this case is exclusively the enforcement of a settlement agreement and the adjudication of the individual rights of the parties thereto.

The questions numbered 1, 2, 3, 5 and 11 relate purely and simply to well established matters of local law which were fully discussed in the opinion of the Court of Appeals (Petitioners' Appendix, pp. 87-99), principally, (1) the rule that settlement agreements will be enforced where there has been substantial performance, (2) the rule that the Court retains jurisdiction pending the closing of such an agreement and has the authority to adjudicate issues presented in its enforcement and (3) recognition that the judgment of the District Court enforcing the settlement agreement is neither a judgment by confession nor a judgment entered into before an action is instituted and is not, therefore, a judgment barred by Section 372.140 of the Kentucky Revised Statutes.

Question number 4 raises only factual issues and is not reviewable. That former counsel ever negotiated with plaintiff contrary to the intentions of petitioners has never been established, nor could it ever be established in view of the fact that petitioners were present and participated in such negotiations.

In questions number 6 and 9 counsel is apparently referring to order of the District Court of January 22,

1959 holding the bonds invalid. If this is so, these questions are clearly not applicable to the subject matter of this appeal, which relates only to the propriety and procedure of the judgment enforcing the settlement agreement. Defendants, instead of proceeding with the second trial, in which event they could have appealed from an adverse judgment, elected to enter into the settlement agreement, failed to perform the same and then appealed an adverse judgment upon their default.

Question number 7 is obscure to say the least. Certainly the Supreme Court will not direct the Court of Appeals to reconsider its denial of petitioners' petition for rehearing. Moreover, if the record below shows any "admission" by respondents' officers that they had not seen the bonds since 1959, petitioners neither raised this matter below nor called the alleged portions of the record to the attention of the Court of Appeals. For these reasons this matter is not now reviewable, even assuming that the alleged "admission" is of any importance at all.

Question number 8 alleges a denial of due process of law on the apparent ground that petitioners were not allowed to file a third-party complaint against their former counsel for allegedly acting beyond the scope of his authority. What petitioners are really complaining of, however, is the District Court's refusal to allow them to repudiate, after an unfavorable decision, what they themselves had participated in. The recent case of *L. W. Holt* v. *Commonwealth of Virginia*, —— U. S. ——, 85 Sup. Ct. 1375 (1965), is cited

in support of petitioners' contentions without any further clarifying statement. This case involved the summary imposition of a fine for contempt under very peculiar circumstances and has no possible connection with the case now before the Court. Another case cited, *Willner* v. *Committee on Character and Fitness*, 376 U. S. 96 (1963) (erroneously cited by petitioners as *Willner* v. *United States*), involved denial of admission to practice of a person who although he had successfully passed the bar examination, was not admitted on "character grounds and was not afforded a hearing." This Court held that the attorney-applicant was denied due process of law when he was refused admission without a hearing. This is a far cry from a client trying to impeach his own attorney after five years of faithful and efficient service. It cannot be overlooked that if petitioners had accepted the advice and judgment of their former attorney on these purely legal matters they would not be in the unfortunate position they are in today.

Question number 10, as it is posed, and the concluding statement therein are not clear as to their exact relationship to this appeal. Counsel is apparently raising the issue of whether or not the judgment entered by the District Court should have been rendered in conformity with Rule 56(e) of the Federal Rules of Civil Procedure relating to summary judgment. This problem was fully discussed by the Court of Appeals; and, as that Court pointed out, Rule 56 is not applicable to the situation in this case, since the judgment rendered by the District Court was in the nature

of a judgment by consent (Petitioners' Appendix, pp. 98, 99). The parties had specificially stipulated that the District Court should retain jurisdiction to enter judgment for plaintiff in the event defendants defaulted. Thus the procedure was controlled by the parties themselves. No authority is cited to the effect that the judgment of the District Court is not in fact a consent judgment.

In *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission,* 315 F. 2d 235 (6th Cir. 1963), cited by petitioners as being pertinent to Question 10, the Court of Appeals for the Sixth Circuit reversed a summary judgment because of the "complex facts and issues involved" and because different inferences might be drawn from those facts. They were indeed complex and involved a contract for the construction of a superhighway. Although in the present case the term "summary judgment" was originally applied because of the very definite provisions for Court action contained in the stipulation by the parties quoted in the Court's opinion, it was not a true summary judgment as envisioned by the Federal Rules of Civil Procedure. Moreover, even if we assume that it was, there was no dispute as to the extent of respondents' and petitioners' performance, as to the value of the bonds (until later raised after an adverse decision) or as to the innocence of both parties vis-a-vis the clerk's inability to find the bonds. In short, it was not at all the complex factual situation described by the Sixth Circuit in the *Ohio Turnpike* case, *supra.*

The allegedly conflicting case from the Fourth Circuit, *United States* v. *Ball*, 326 F. 2d 898 (4th Cir. 1964), also cited by petitioners as being pertinent to question 10, involved the reversal of a summary judgment against a taxpayer obtained pursuant to provisions of the Internal Revenue Code. There are simply no points of comparison or analysis between it and the *Ohio Turnpike* case. Moreover, since the granting of a summary judgment must remain within the sound discretion of the trial court, it is virtually impossible to speak in terms of a conflict between circuits in this context. However, the plain fact is that the Court is not here concerned with a summary judgment but with a consent judgment.

To summarize, instead of accepting a sure settlement of $105,000, petitioners took an all-or-nothing, shoot-the-works approach, even though the odds were clearly against them. It was a major and expensive error in judgment, but by no stretch of the imagination were any serious federal questions involved. Even in the petition for certiorari petitioners continue to retry the case (Petition, p. 19) and heap abuse on their former counsel. The reference to his "pressing them into a new settlement agreement" (Petition, p. 13) is somewhat ironic, since the proffered advice was very sound in the light of the District and Circuit Court's subsequent decisions. In fact, there is no conflict between this decision of the Sixth Circuit and decisions of its own or any other circuit. No new, novel or important question of federal law is raised. No conflict with this Court's decisions is involved. In short, the

district court pursuant to stipulation of the parties and with full knowledge of all the facts enforced the settlement agreement and was affirmed in every respect by the Appellate Court.

CONCLUSION.

For the reasons set forth above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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HENRY R. HEYBURN,
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Office-Supreme Court, U.S.
FILED
JUL 30 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, ---------- Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, ---------- Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF RESPONDENTS JAMES E. DUNNE, II, AND MOSES MASTERS, ADMINISTRATOR.

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Attorney for Respondents,
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ADMINISTRATOR.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF RESPONDENTS JAMES E. DUNNE, II AND MOSES MASTER, ADMINISTRATOR.

STATEMENT OF THE CASE BY RESPONDENTS JAMES E. DUNNE, II AND MOSES MASTERS, ADMINISTRATOR.

Without repeating or contradicting the facts as set out by the petitioners or the respondent, All States Investors, Inc., it suffices to say that following such litigation in which the jury

had hung following an extended trial, these respondents anticipated successful conclusion of another jury trial of the two cases, being jointly heard. Such new trial had commenced on January 21, 1963. It appeared that patent errors of the proceeding trial were not being repeated. Without discussing details on January 23, 1963, on the third day of the trial, the parties announced that "* * all matters have been settled in each suit * *". Such settlement provided for respondent, James E. Dunne II to pay $15,000 over a period of five years, being $3,000 per year, without interest, final order of dismissal to be entered upon the closing within a thirty day period. Such respondent promptly executed and delivered his note. Petitioners were purchasing the bonds in litigation held by the plaintiffs, respectively. Since the contemplated settlement was not completely effectuated due to failure of respondent, All States Investors, Inc. to deliver the bonds, which it allegedly owned and held, respondent James E. Dunne II has taken no part in the extended controversy attributable to such non-delivery, other than was necessary in order to maintain the order of dismissal as to himself and respondent Moses Master, Administrator. Patently the settlement burden was carried by petitioners. Respondent James E. Dunne's $15,000 note, payable to petitioners, was a contribution toward the purchase of the bonds in controversy based on and affective when the settlement should be completed within the thirty day period.

Neither respondent James E. Dunne II, nor respondent Moses Master, Administrator, has participated actively in the controversy between petitioners and respondent, All States Investors, Inc., since they agree with petitioners that failure of respondent, All States Investors, Inc., to deliver its bonds voided any right to receive the agreed purchase price of $90,000 in cash, Plus petitioner's $15,000 note.

Respondents James E. Dunne II and Moses Master, Administrator, do not travel with respondent, All States Investors, Inc.

in assuming that "• • petitioners took an all-or-nothing, shoot-the-works approach, even though the odds were clearly against them. • •" Admittedly petitoners were buying the bonds. In an interlocutory order entered January 8, 1958 "• • the Court heard arguments as to the validity of the West Buechel bonds in the amount of two million dollars and made a ruling that the bonds were not issued in conformity to the laws and Kentucky Statutes and were therefore invalid." (Petitioners' Appendix pp. 1). On January 17, 1959 respondent James E. Dunne II undertook to appeal from such interlocutory order (Petitioners' Appendix pp. 3-4). In another memorandum entered February 6, 1959 the Court in an extended opinion overruled such motion to appeal and entered an order on February 7, 1959 "That the record not be prepared and forwarded to the United States Court of Appeals for the Sixth Circuit". (Petitioners' Appendix pp. 4-8). Such Court in reaching the above stated decisions directly violated instructions issued to it by such U. S. Court of Appeals for the Sixth Circuit under closely related facts in Sunbeam Corp. v. Richardson, 24 3F. 2d 501, and in reversing such Court said:

> "• • In Walker v. Felmont Oil Corp., 6 Cir., 240 F. 2d 912, 916, this court noted that 'Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. • • • "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." • • • There is no direct ruling by the Kentucky Court of Appeals on this question. No matter how seasoned the judgment of the District Judge may be, it cannot escape being a forecast rather than a determination. • • •'
>
> "Under the circumstances of the instant case, we are of the view that comity and a regard for the consideration of the court of last resort in Kentucky require that the determination of the constitutionality of the State Fair Trade Act under the State Constitution be held in abeyance until the issue has been determined by the Kentucky Court of Appeals. • •"

Since patently the ultimate decision on the validity of the bonds involved will be made by Kentucky courts, the question of value remains for future decision. U. S. Court of Appeals for the Sixth Circuit in its opinion of April 7, 1965 concluded that "*** The bonds were in default, were generally regarded as worthless and had been adjudicated invalid. Although not actually adjudicated the trial Judge expressed the opinion that any recovery on the bonds was barred by the statute of limitations." (Petitioners' Appendix pp. 98).

Notwithstanding the interlocutory background and the caution contained in the Sunbeam case, supra, the Court saw fit to declare the bonds invalid, with the result that the Court of Appeals was patently influenced and failed to recognize its rule laid down in the Sunbeam case, supra. The parties had made a buy and sell settlement agreement. The Court, sustained by the Circuit Court, has seen fit to modify the agreement as made by the parties. Under such circumstances respondents James E. Dunne II and Moses Master, Administrator, respectfully insist that consideration for the $15,000 note executed by James E. Dunne II was not received and consequently his note should be cancelled.

Section 355.8-405(2) KRS (Petitioners Appendix pp 122b) specifically provides procedure to be followed where securities are lost, destroyed or stolen. It can hardly be contended that the personal bond, without any security being posted, would satisfy the "** reasonable requirements imposed by the issuer **". Few financial institutions accept personal endorsement on paper without additional quick asset security.

CONCLUSION

It is respectfully insisted that the settlement agreement was not consummated and consequently is void.

Respectfully submitted,

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James E. Dunne II and Moses
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Dunne, Deceased.

(2) Where the owner of a security claims that the security has been lost, destroyed or wrongfully taken, the issuer must issue a new security in place of the original security if the owner

(a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser; and

(b) files with the issuer a sufficient indemnity bond; and

(c) satisfies any other reasonable requirements imposed by the issuer.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Denied October 11, 1965)

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QUESTIONS PRESENTED.

1. Should a petition for rehearing be granted where the record before the Court shows:

   That the appellate court reformed the contract in issue changing its express terms and then enforced the contract as rewritten and construed?

2. Should this Court grant the petition, where the record shows that the contract in issue was procured by appellees' false representations, accepted by the Court and petitioners as true, that the bonds in issue were in possession of the Court Clerk, while in fact, as admitted by appellee after the appeal was filed, no representative of appellee had seen or had possession of the bonds during the preceding four years?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - - *Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - *Respondents.*

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

This petition is filed in reliance upon two points that controlled the decisions below, each of which this Court has considered to have merits in questions of reconsideration.

Neither of the petitioners, nor their counsel, can gain anything incident to the delay caused by the filing of this petition.

THE JUDGMENTS BELOW CREATE NEW LAW WITH RETROACTIVE APPLICATION, TO THE EXTENT THAT PETITIONERS COULD NOT HAVE KNOWN THE COURT OF APPEALS WOULD REFORM AND ENFORCE THE REFORMED CONTRACT.

The Courts below entered judgment substantially as demanded in the original cause of action, that had been terminated by a private contract of settlement, as reformed by the Court of Appeals. The Federal Securities Acts were no longer involved. The contract of settlement was in issue but it was never filed by any of the parties. It was executed in Kentucky, and was to have been performed in Kentucky. The laws of that state controlled its enforcement.

The federal questions now involved are constitutional questions. The Seventh and Fourteenth Amendments to the Constitution of the United States are directly applicable to the present issues.

The petitioners were denied the right of a trial on the charges of fraud and collusion of counsel in the District Court proceedings. They have been deprived of their properties without due process of law, in violation of the FOURTEENTH AMENDMENT, which guarantees equal protection of liberty and property.

The processess by which the petitioners have been deprived of their properties are unprecedented and unparalleled. Established procedures were ignored and procedures were invoked that changed then laws to fit the judicial objective, and enforced with retroactive application.

The judgment is punitive. The Respondent, All States Investors, Inc. breached a private contract of settlement (Appendix 57) by not delivering bonds it had sold and agreed to deliver by a named date, which was of the essence. Two months after the breach All States offered to execute an indemnity bond in lieu of the bonds it had agreed to sell. The Court was advised of an indemnity offer made after default, and held a conference on April 27, 1963. All States filed a motion for judgment prior to the conference (Appendix Pages 47-48). The Court directed All States to file an amended motion for judgment, which was done (Appendix Page 51). The Court issued orders directing payment of $105,000.00 by fixed dates, under penalty that if petitioners did not obey, that a judgment would be entered against them for $257,500.00 with eight years' interest. First a judgment was entered for $257,500.00 with eight years' interest, the enforcement of which was shortly thereafter suspended, pending reconsideration of the question of interest. The final judgment awarded interest from date. The rulings of the District Court were:

> "Moreover, the Court finds that the negotiations of the parties, subsequent to discovery of the loss of the bonds, resulted in a modification of the settlement agreement whereby the assignment, release, and indemnity agreement, and the guaranty agreement, would be substituted in lieu of delivery of the bonds." (Appendix page 53).

> "The Court is of the opinion that the negotiations were such that upon tender of the indemnity and guaranty agreements by the plaintiff, an agree-

ment to modify the original settlement was accordingly effected." (Appendix Page 54).

"By the device of substitution of counsel, however, the defendants will not be permitted to withdraw their consent to an agreement voluntarily and knowingly entered into by them. Neither are they entitled to a rehearing upon an adverse ruling merely by reason of substitution of counsel." (Appendix page 60).

The Court of Appeals reached its decision upon a premise that the bonds were worthless by finding that an Interlocutory Order made in 1959, in the action which was settled, was sua sponte final. That petitioners consented to entry of judgment against them for $257,500.00, stating:

"It is in the nature of a judgment by consent."

In *United States, Appellant* v. *Ward Baking Co.*, 376 U. S. 327, 11 L. Ed. 2d 743, 84 S. Ct. 763, decided March 9, 1964, a "consent" judgment was vacated and the case remanded for trial, the Court stating:

"We decide only that where the Government seeks an item of relief to which evidence adduced at the trial may show that it is entitled, the District Court may not enter a 'consent' judgment without the actual consent of the Government."

The Court of Appeals agreed with the District Court that an attorney can control the substantive rights of his client, over the objections of the client made known to the Court by the client, in the absence of fraud or collusion, which in this case, the petitioners

moved for leave to allege and prove, which was denied them.

The Court of Appeals ruled:

> "Under these circumstances we are of the opinion that the failure to deliver the bonds was not a material variance from the terms of the contract and would not excuse performance on the part of the defendants Bankers Bond and Mrs. Sedley. We agree with the trial judge that there was substantial performance on the part of All States Investors, and that the failure to deliver the bonds, under the circumstances, did not constitute a material failure of performance."

The Court of Appeals did not concur with the District Court that petitioners had agreed to a modification of the settlement contract, having reached the conclusion that the contract did not require modification to find that the petitioners breached its terms.

Had All States Investors delivered the bonds by February 23, 1963 they would have received $105,000.00. The judgments are for $257,500.00 for an indemnity against liability—not for the value of the bonds. The District Judge was confused in his rulings on this question.

The Court of Appeals reformed a contract to pay $105,000.00 and forthwith imposed a retroactive penalty of $152,500.00 for failure to comply in 1963 with the contract made by the judgment in 1965.

Petitioners suggested to the Court of Appeals, in their Petition for Rehearing, that judgment be entered for $105,000.00, the amount due under the contract, as reformed by the Court.

This Court contemporaneously with the proceedings in this action decided that consent to the entry of a judgment cannot be presumed; that substantial justice is a right of parties to an action, and that ambulatory judicial decisions cannot, under due process, be enforced retroactively so as to deprive a man of his liberty. Due process is equally applicable to depriving a man of his property.

In *Simon Bouie, et al.* v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697, the question of application of due process was before the Court, in a civil rights, sit-in, case.

The Court found that a statute precise on its face had been "Unforeseeably and retroactively expanded by judicial construction," . . .

The opinion states that:

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question."
>
> . . . . . .
>
> "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."
>
> . . . . . .
>
> "It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment."

SUBSEQUENT TO FILING OF THE APPEAL, PETITIONERS IN AN ACTION FILED BY ALL STATES INVESTORS, INC. PROVED BY ADMISSIONS OF ALL STATES THAT IT HAD NOT HAD THE BONDS IN ISSUE SINCE 1959. THE REPRESENTATION THAT THE CLERK HAD THE BONDS IN 1963 WAS INTENTIONAL FRAUD, MADE TO INDUCE A SETTLEMENT WHICH WOULD NOT HAVE BEEN MADE IF THE TRUTH HAD BEEN KNOWN.

The Notice of Appeal was filed on May 23, 1964. The petitioners could not supersede the judgment. The respondent All States Investors on June 12, 1964 filed action No. 4803, in the United States District Court in which this action was filed, against the petitioner Elinore Sedley to set aside three conveyances made by her.

By answer and counterclaim Mrs. Sedley pled several affirmative defenses, authorized by F.R.C.P. 60 (3) (6) that the judgment was void, and by counterclaim alleged that All States Investors was never the owner of the bonds in issue and that the plaintiff falsely and fraudulently represented to petitioners that it had delivered the bonds to the Clerk of the Court; that petitioners relied upon the false representations and were thereby induced to sign the settlement agreement in issue in this action.

Requests for Admissions and Interrogatories were served on All States Investors, Inc. for the purpose of proving that the corporation was a $1000.00 corporation on paper with no office, officers or directors; that the corporation had never been in possession of any

West Buechel bonds, and the ultimate fact that the attorney of record for All States had made a false and fraudulent representation that he had delivered the bonds to the Clerk, which induced petitioners to sign the stipulation on January 23, 1963 reciting that the bonds which All States agreed to sell to petitioners were in possession of the Clerk, when, in fact, the attorney for All States knew that they were not.

The Courts below excused All States by ruling there was a mutual mistake, which if true would make the contract unenforceable. The Interrogatories, Requests for Admissions and Answers, were copied in an appendix to the Petition for Rehearing in the Court of Appeals and are now part of the record forwarded to this Court. The Court of Appeals refused to consider the proceedings by order entered on May 20, 1965 (Appendix Page 100, Petitioner's Brief).

All States in answer to request No. 3 (Appendix, Court of Appeals Petition for Rehearing 2a) admitted that

> "No officer, agent, servant or employee of All States Investors, Inc. has seen them (bonds) since they were produced in open Court and left on a table in the Courthouse at the time the jury was discharged as hung."

The jury was hung at the first trial in 1959, four years prior to the January, 1963 contract.

Counsel for All States knew that the bonds were not in its possession when the action was called for trial. He knew that his representation that the bonds had been filed with the Clerk was false. Petitioners

could not have been induced to agree to settle the case had it known that All States did not have the bearer bonds. The Clerk on October 9, 1963 stated the bonds had not been filed and that the settlement agreement had never been filed nor seen by him (Appendix Page 56).

Any final judgment may be set aside for mistake or fraud on a party or the Court or for any other justifiable reason F.R.C.P. 60 (1) (3) (6).

The Court of Appeals was in error in overruling the motion to review action 4803, disclosing that the parties were not mistaken; that a fraud had been perpetrated on the Court.

The District Court ruled (Appendix Page 52):

> "On the basis of the record it appears undisputed that the subject bonds are, by accident and without fault or intention, lost, stolen, or misplaced, and the Court so finds."

The Court would not permit petitioners to plead or prove the facts. The bonds were not filed in the first trial.

A question presented by this petition is whether the final decision should be based upon what is true, or upon erroneous judicial speculations. This Court does not hesitate to learn the available truth. There is no limitation on the power and jurisdiction of an appellate court to do so.

In *Smith* v. *Pennsylvania,* 376 U. S. 354, 11 L. Ed. 2d 753, 84 S. Ct. 763, the point in issue on certiorari was whether the trial court's statement in support of a rul-

ing that the Federal Government had indicated it would not honor a requested subpoena. This Court made inquiry and learned that the Department of Justice was not informed of, and did not refuse to comply. In light of that representation, the writ was granted for reconsideration of the petitioners' claim.

The Rules of Procedure grant petitioners the right to prosecute the pending action to set aside the judgment before the Court, on the grounds of mistake or fraud. It is within the inherent power of the Court to purge an action tainted with fraud upon the Court at any time. Therefore, the Court is urged to sustain the petition.

For the reasons stated, petitioners submit that the grounds for this petition are extraordinary and that it should be granted. Petitioners would eagerly meet All States Investors on any legal issue between them, including the original claim.

Respectfully submitted,

WILBUR FIELDS,
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Counsel for Petitioners, The Bankers Bond Company, Inc., and Elinore Sedley.

CERTIFICATE OF COUNSEL.

Counsel for petitioners hereby certifies that this petition is presented in good faith and not for delay, and to avoid delay in pending proceedings to set aside the judgment pursuant to F.R.C.P. 60 (1) (3) and (6).

WILBUR FIELDS